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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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LAKE CHARLES AMERICAN PRESS AND
WILLIAM HUGH SHEARMAN
*Petitioners*

v.

ROBERT M. MCHALE
*Respondent*

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## PETITION FOR A WRIT OF CERTIORARI TO THE THIRD CIRCUIT COURT OF APPEALS FOR THE STATE OF LOUISIANA

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## QUESTIONS PRESENTED

### I.

Whether the statement complained of in this case is merely rhetorical hyperbole, a pure expression of opinion, and thus absolutely privileged from defamation liability.

### II.

Whether, in a public official libel case, constitutional "malice" can be found where the publisher of an editorial comment believed in the truth of the idea which was intended to be conveyed.

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## OPINIONS BELOW

The opinion of the Fourteenth Judicial District Court, Parish of Calcasieu was adopted, almost in its entirety, by the Louisiana State Court of Appeals for the Third Circuit. The latter opinion is set forth in the appendix at page 1a and is reported at 390 So.2d 556 (1980).

## JURISIDICTIONAL STATEMENT

This libel case filed by Robert M. McHale was tried before the Fourteenth Judicial District Court, Parish of Calcasieu, commencing on September 4, 1979, and concluding on September 7, 1979. On October 25, 1979, the trial court rendered judgment in favor of plaintiff against defendants, Lake Charles American Press, Inc. and Hugh Shearman, for $150,000 in compensatory damages. Defendants and plaintiff cross appealed to the Louisiana Third Circuit Court of Appeals. Said

court affirmed the trial court's judgment in favor of plaintiff for compensatory damages in the amount of $150,000 and added an award of $25,000 for plaintiff's attorneys' fees.

On November 6, 1980, defendants applied for a rehearing in the Court of Appeal and plaintiff did likewise on November 7, 1980. On December 1, 1980, the Third Circuit Court of Appeals denied both applications for rehearing. Defendants subsequently applied to the Louisiana Supreme Court for a writ of certiorari or review to the Court of Appeals. The Louisiana Supreme Court denied the application on January 26, 1981. Jurisdiction over this matter is conferred on this Court by 28 U.S.C. § 1257 (3) (1976).

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . "

## STATEMENT OF THE CASE

Why should this Court take this case? Isn't this just another "run of the mill" libel case where the press feels aggrieved at what would appear to be a punitive judgment by a local political trial judge and where the plaintiff, a local politician of stature only in his local community, feels that the alleged grievous injury to his reputation has been properly assuaged by the trial judge's judgment?

Let us face the fact that throughout our Land, state trial courts, with or without juries, have been assessing damages against individual newspapers, other publications, editors and

reporters on a basis which bears no relationship whatsoever to the asserted injury.

Too long have we toyed with the use of the platitude "chilling effect." We most emphatically assert that the time has come when this Court of last resort for citizens of this Country should address itself in this field of conflicting First Amendment rights to the subject of the absolutely disastrous effects inflicted on the instruments which are designed to bring information to the people of our Country, resulting from judgments such as the $9.2 Million judgment in the Alton (Illinois) Daily Telegraph case.[1] There, a case where the newspaper on April 1, 1981 had to enter the state courts of Illinois and undergo Chapter 11 Bankruptcy to prevent seizure of its property by the plaintiff, a case which clearly should be reversed on appeal, no bond could be written to protect the appeal right.

Take the case decided in California by the Local Superior Court of San Francisco in 1979 where a punitive jury verdict of $4,560,000 has been awarded against the San Francisco Examiner, a reporter and a freelancer, in a case which is now on appeal before the Intermediate Court of Appeal of California and again one which should be reversed.[2] The three plaintiffs in that case testified from their own mouths that they had suffered no injury whatsoever and other extrinsic evidence proved just that. Take the Penthouse case in Wyoming[3] in which an award of $26 Million has already been halved by the trial court and is now on appeal. Take the Carol Burnett case where a punitive verdict of $1.6 Million has been awarded to a television actress who felt insulted because of an erroneous report of her conduct in a Washington bistro.[4] These cases do not create a "chilling effect." They have a "killing effect!"

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[1] *Green v. Alton Telegraph Printing Co.*, Civil No. 77-L-66 (Third Judicial Circuit, Madison County, Illinois).

[2] *McCoy v. The Hearst Corp.*, Civil No. 714-677 (Superior Court of California, in and for the City and County of San Francisco), *appeal pending*, Civil No. 49915 (Court of Appeal of the State of California, First Appellate District).

[3] *Pring v. Penthouse Int'l.*, Civil No. C79-351B (D. Wyo. Feb. 20, 1981).

[4] *Burnett v. National Enquirer*, Civil No. C157213 (Superior Court, State of California, City of Los Angeles, March 26, 1981).

We believe it time for this Court to avail itself of the opportunity as suggested by Justice Stewart in his dissent in *Herbert v. Lando,* 441 U.S. 153, 199 (1979), to review the *New York Times* decision of 1964 and delineate what it means by "constitutional malice." We believe this Court has clearly stepped away from common law malice. We believe that this Court intended to say that much more than mere hatred and ill will had to be involved for "constitutional malice" to apply in public official and public figure cases. There isn't any question but that what we are dealing with here is a trial court's misinterpretation of that rule and there is no question here but that plaintiff was both a public official and a public figure in his local community. With this background let us address ourselves briefly to what the primary facts relating to this case are and urge this Court to take the case as one that presents the serious issues of editorial hyperbole and the real meaning of "constitutional malice" as enunciated by this Court in 1964.

This libel case arises out of the publication of an editorial by the Lake Charles American Press on July 21, 1977 entitled "What's Story behind McHale reappointment?" At trial, plaintiff, a local attorney, focused his case on a single sentence appearing in the editorial which stated: "No bond buyer would buy a nickel's worth of securities on McHale's opinion." The editorial is set forth in its entirety in the opinion of the Louisiana Third Circuit Court of Appeal. (Appendix p. 3a)

Plaintiff is an attorney who had been active politically in Lake Charles, Louisiana and environs for many years. He began practicing law in Lake Charles, Louisiana in 1956. He served as City Attorney for the City of Lake Charles by appointment of the Mayor from July 1, 1965 to March 17, 1976 and again by appointment from July 6, 1977 to 1979. He also served as attorney for the Lake Charles Harbor and Terminal District by appointment of its Board of Commissioners during the period 1967 to date. He held both of these public offices at the time of the publication involved in this suit and at the time suit was filed. He has been involved in numerous political compaigns, including active support of four successful gubernatorial campaigns. The trial court held that McHale was a public official for purposes of this litigation.

The Lake Charles American Press is a daily newspaper which has been published in Lake Charles, Louisiana for over 50 years. The newspaper is owned by defendant Lake Charles American Press, Inc. William Hugh Shearman, also a defendant, is its publisher.

Long before the plaintiff had risen to prominence in the Southwest Louisiana political establishment, the American Press had diligently pursued stories relating to the expenditure of public funds and those who profited therefrom, including expenditures for legal services. When plaintiff began to receive compensation from public bodies, he likewise received attention in the pages of the American Press.

One of McHale's duties as Lake Charles City Attorney involved rendering legal opinions concerning the issuance of certificates of indebtedness, paving certificates and sewerage certificates. Some of these securities were issued on McHale's opinion alone. For larger issues, he often associated with the law firm of Benton, Benton & Benton, or other established securities and bond specialists.

In contrast to McHale's experience rendering opinions on securities issues, he had never been the sole attorney to render an approving legal opinion on a municipal bond issue. In those few instances in which he had been involved in preparing legal opinions approving bond issues, he had always associated with law firms recognized as specialists in municipal bonds.

On July 21, 1977, the American Press ran a lead editorial clearly labeled as such and appearing on its editorial page. In that editorial, the American Press criticized the reappointment of the plaintiff as City Attorney, criticized the payment of bond fees to the plaintiff in the past and included the following statement of opinion:

> "No bond buyer would buy a nickel's worth of securities on McHale's opinion."

Plaintiff promptly filed a suit claiming he had been libeled in the editorial of July 21, 1977.

## I. MERE RHETORICAL HYPERBOLE, A PURE EXPRESSION OF OPINION, IS ABSOLUTELY PRIVILEGED FROM DEFAMATION LIABILITY

The sentence "No Bond Buyer Would Buy a Nickel's Worth of Securities on McHale's Opinion" is mere rhetorical hyperbole, a pure expression of opinion, and thus is absolutely privileged from defamation liability.

Although at common law falsity was assumed and truth was a defense, following this Court's decision in *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), "the plaintiff now almost certainly has the burden of proving falsity". Sack, *Libel, Slander and Related Problems* (Practicing Law Institute, 1980), at 40.

Whether the plaintiff must prove—or the defendant disprove—falsity, this Court has observed that its primary concern in public official libel cases is the "profound national committment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks . . . " *New York Times Co. v. Sullivan, supra,* at 721. Recognition of the fact that effective discussion about the operations of government may consist of severe, sarcastic and satirical criticism of public servants, requires that trial courts weigh very carefully what is libelous and what is not. The " 'requirements for actionable libel are strict in the interests of protecting freedom of expression' ". *Byars v. Kolodzicj,* 363 N.E.2d 628, 630 (Ill. App. Ct. 1977) (citation omitted).

Thus, in public official or public figure libel cases, "before the test of reckless or knowing falsity can be met, there must be a false statement of fact." *National Assoc. of Letter Carriers v. Austin,* 418 U.S. 264, 284 (1974). Based on this principle this Court has reasoned that:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries, but on the competition of other ideas. But there is no constitutional value in

false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974) (citation omitted).

The expression of pure opinion—that is, an "assertion that cannot be proved false[—] cannot be held libelous." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2nd Cir. 1977). Similarly, the use of "loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies . . . . . is not to falsify facts." *Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943), quoted in *National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 284 (1974).

Thus, a pure statement of opinion, or the use of harsh language which is obviously understood to be rhetorical hyperbole, is absolutely protected from defamation liability. Opinion which impliedly is based upon unstated defamatory facts, however, may be defamatory.

The words which were found below to constitute a defamatory statement of fact are "No bond buyer would buy a nickel's worth of securities on McHale's opinion." The Third Circuit Court of Appeal for the State of Louisiana, adopting the opinion of the trial court, found that this statement "directly attacked and damaged [McHale's] reputation within his profession. It articulated as a fact a condemnation that portrayed him as a totally incompetent bond attorney. ***[T]he great majority of readers interpreted it exactly for what it said, that McHale's opinion on securities was worthless to any bond buyer." Appendix at 7a. At trial, Mr. Shearman testified that what he intended to say in this statement was that he believed no one would buy bonds on the underwriting opinion of McHale alone. The word "securities" was used in place of "bonds" in order to improve the style of the editorial by avoiding the constant repetition of the word "bonds". The sentence next preceding the challenged statement read "The bond fees [paid to McHale] are totally unnecessary and are a waste of the taxpayers' money."

Plaintiff McHale and other witnesses testified at trial that McHale had prepared legal opinions on securities (primarily sewerage and paving certificates) issued and sold by the City of

Lake Charles. On the larger issues, the legal work was done in conjunction with attorneys from law firms specializing in bond work. McHale admitted at trial that no one ever bought bonds on his opinion alone.

Yet it is respectfully submitted that viewing the editorial as a whole, in the context of the underlying political debate over McHale's reappointment as City Attorney, the challenged statement undoubtedly constituted a protected expression of opinion.

Having determined that Petitioners published a defamatory statement of fact, the trial court overlooked Petitioner Shearman's unrebutted testimony that in saying "securities", he did not intend to falsify facts, but merely made a poor choice of words. Straining to find evidence of actual malice, the trial court found Petitioners' acknowledgement earlier in the same editorial of McHale's services in connection with the successful sale of municipal securities to be proof of knowing falsity. By electing to consider the complained-of Statement to be a deliberate or reckless assertion of fact which directly contradicted prior statements in the very same editorial, the trial court purportedly found clear and convincing evidence of defamation. Moreover, the prior reference to McHale's legal work on Lake Charles' securities issues, when juxtaposed with the sentence "No bond buyer . . .", was found by the Trial Court also to imply that "there was some dishonesty connected with [McHale's] acceptance of fees for bond issues". Appendix, at 7a.

Nevertheless, not one witness at trial testified that these sentences reasonably implied dishonesty connected with McHale's acceptance of fees for bond issues. The association between stating that McHale had been paid fees for city securities work although "No [one] would buy . . . securities on [his] opinion", and the imputation of sharp practices in connection with the city's retention of McHale on security issues, is simply without evidentiary support and cannot be presumed.

It is respectfully urged that the challenged statement is subject to a different, and more plausible, interpretation. The

trial and appellate courts' debatable construction of the editorial as a whole gives inadequate weight to the imperatives of "uninhibited, robust, and wide-open" debate. *New York Times v. Sullivan, supra,* at 271. The gist of the editorial—as it relates to McHale's employment as bond counsel to the City of Lake Charles—is that the citizens of Lake Charles are not getting the best value for their money, that more experienced local bond attorneys are available to perform the City's bond work. To say, in essence, that "McHale's opinion . . . was worthless to any bond buyer", Appendix, at 7a, is merely a fanciful, vituperative, and exaggerated way of expressing Petitioners' opinion of McHale's abilities, i.e., rhetorical hyperbole.

With respect to the isolated meaning of "No bond buyer would buy a nickel's worth of securities on McHale's opinion", this sentence obviously does not constitute "a statement of existing fact", *Mashburn v. Collins,* 355 So.2d 879, 885 (La. 1977), in terms of whether banks and other security buyers ever had bought or were then buying securities approved by McHale.[5] Even if literally intended or construed to state the marketability of bonds approved by McHale, it does not state

[5] The word "would" in the subject sentence is a use of the verb "to be" as an auxillary verb in the "potential mode". See, e.g., *The New Webster Encyclopedic Dictionary of the English Language* (Consolidated Book Publishers, 1969) 156-161; Fernald, *The Working Grammar of the English Language* (Funk & Wagnalls, 1917) 190-191. The "mode" (or "mood") of a verb "is a form of the verb that indicates the manner in which the action or state expressed by the verb is to be regarded." Fernald, *supra,* at 115. The "potential mode" also has been labelled the "conditional mode", which has been likened to the subjunctive mode. *The New Webster Encyclopedic Dictionary of the English Language, supra,* at 156. Unlike the "indicative mode" which "expresses a simple fact, declarative or interrogative", *Id.* at 155, the conditional or "potential mode expresses wish, entreaty, possibility, or necessity." Fernald, *supra,* at 117. The subjunctive mode is defined as a "verb form or set of verb forms that represents an attitude toward or concern with a denoted act or state not as fact but as something entertained or thought as contingent or possible or viewed emotionally." *Webster's Third New International Dictionary* (G.T.C. Merriam Co. 1968). In short, even if construed literally, the clause "No bond buyer would buy . . ." is not a declarative statement of fact. It is a supposition or viewpoint as to potential events.

an existing fact, but an opinion of conditional circumstances that might arise.

Thus, in *Chavez v. Citizens for a Fair Farm Labor Law,* 148 Cal. Rptr. 279, 281-82, 84 Cal. App.2d 77 (Cal. App. Ct. 1978), the Second District Court of Appeal for California found the statement that enactment of a proposed Agricultural Labor Relations Initiative Statute "*would* entail a deprivation of property rights" (emphasis added) to be a protected statement of opinion about the future effect of a political initiative.

Yet entirely aside from the literal import of the conditional, potential or subjunctive mode of the verb "to be"—i.e., "would"—the context in which the offending statement was made clearly indicates that the sentence in question expresses pure opinion.

> "As in the case with respect to all interpretation of language for purposes of the law of defamation, context, both in terms of the language used and the situation in which it is used, is determinative. Potentially defamatory statements in the guise of fact uttered during a bitter political debate, for example, will often be understood to be rhetorical opinion." Sack, *supra,* at 157; see also, *Cantwell* v. *Connecticut,* 310 U.S. 295, 310 (1940); *Mashburn* v. *Collins, supra,* at 885.[6]

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[6] The following allusions have been found to constitute protected opinion—that a city manager would "stoop to any form of action . . . [in his] power to . . . stay in office", *Scott v. McDonnell Douglas Corp.,* 17 Cal. 3rd 596, 552 P.2d 425 (1976); that a mayor "often misleads" the press, *Craig v. Moore,* 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. 1978); that the election of a particular candidate for mayor by city councilmen who had "demonstrated a penchant for cronyism" "appears to have paid off a three year old political debt", *Salvo v. Salem News Pub. Co.,* 4 Med. L. Rptr. 1856 (Mass. Dist. Ct. Essex 1978); that "sometimes [a particular legislator's] change of heart comes from the pocket", *Sillars v. Collier,* 151 Mass. 50, 123 N.E. 723 (1890), quoted in *Salvo, supra;* that one candidate's campaign for election to a hospital board of directors constituted political "chicanery", *Desert Sun v. California Superior Court,* 5 Med. L. Rptr. 1881 (Cal. Ct. App. 1979); that a Township Supervisor's promotion of the Township's purchase of land adjacent to his own raised "a conflict of interest at the very least, and perhaps

*(footnote continues)*

The editorial accurately stated the fact that McHale received fees on Lake Charles securities issues. The fact that many of those securities were purchased by security buyers was "common knowledge or readily accessible." *Mashburn, supra,* at 885. The statement "No [one] would buy . . ." obviously reflected the American Press' hyperbolic editorial opinion as to the value placed by others on McHale's approving legal opinions.

The published statement did not clearly convey the meaning intended—i.e., that there was no legitimate reason for funnelling bond fees to McHale since Lake Charles never issued unsecured general obligation bonds without at least having more experienced bond counsel associate with McHale on the approving legal opinion. Nevertheless, regardless of whether McHale's legal opinions on bond issues are or are not as important to the success of a particular bond issue as the opinion of other counsel, and regardless of whether McHale is or is not an able bond attorney, the published statement clearly reflects Petitioners' opinion on these matters.

Just as someone might say colloquially in the course of last year's national elections that "No one would vote for Jimmy Carter", or "Everyone can see that Ronald Reagan's proposed economic program would be disastrous", the statement published by Petitioners was merely rhetorical hyperbole reflecting their editorial opinion on the competence of a public official.

While the distinction between a statement of fact and an expression of opinion is often blurred, see, e.g., *Buckley v. Littell,* 539 F.2d 882, 893-95 (2nd Cir.), cert. den. 429 U.S. 1062 (1977), several factors demonstrate that the statement at issue was one of opinion.

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*(footnote continued)*

much more", *Redding v. Carlton,* 296 A.2d 880 (Pa. Super. 1972); that a named individual is a "crook", *Klein v. McGauley,* 29 A.D.2d 418, 288 N.Y.S.2d 751, 755 (2nd Dept. 1968); that plaintiff was "paranoid", a "schizophrenic", *Fram v. Yellow Cab Co. of Pittsburgh,* 380 F. Supp. 1314, 1329 (W.D. Pa., 1974.)

The material published was prominently identified as an "American Press Editorial". The editorial was "written from a subjective, rather obvious, point of view and did not purport to be anything else." *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 2 Med. L. Rptr. 2169, 2175 (N.Y. Ct. App. 1977). It took a strong editorial opinion on a significant local political issue, urging a different selection for city attorney—the selection of a less "controversial attorney".

The particular statement found libelous obviously did not purport to state a bald, unambiguous fact. The words, "No bond buyer would buy a nickel's worth of securities on McHale's opinion", were used in a "loose, figurative sense". *Letter Carriers v. Austin, supra,* at 284. To suppose that readers would construe this sentence literally to mean that "McHale's opinion on securities was worthless to any bond buyer", Appendix, at 7a — i.e., that not a single bond buyer would put even five cents at risk on a bond approved by McHale—is at best a tenuous and farfetched conclusion, which ignores the common use of hyperbole in editorial commentary.[7]

And while persons may be defamed in newspaper editorials, the decision below ignores the fact that readers typically

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[7] Courts have given wide berth to the use of hyperbole in critical commentary on political or other public figures. Cases have held nonactionable the words "blackmail", *Greenbelt v. Bresler,* 398 U.S. 6 (1970); "traitor", *Old Dominion Letter Carriers v. Austin,* 418 U.S. 264 (1974); "bastard", *Curtis Pub. Co. v. Birdsong,* 360 F.2d 344 (5th Cir. 1966); "destroyed", *Time v. Johnston,* 448 F.2d 378 (4th Cir. 1971); "liar", *Wade v. Sterling Gazette Co.,* 56 Ill. App.2d 101 (3rd District, 1965); "dishonorable and deluded", *Delis v. Sepis,* 9 Ill. App.3d 317 (Ill. App. 1972); "nut" and "screwball", *Skolnick v. Nudelman,* 95 Ill. App.2d 293, 237 N.E.2d 804 (Ill. App. 1968); "completely loses his cool, turns purple * * * Prussian dictator", *Vola Solbrig v. Licata,* 15 Ill. App.3d 1025, 305 N.E.2d 252 (Ill. App. 1973); "deceptive individual", *Craig v. Moore,* 4 Med. L. Rptr. 1402 (Fla. Cir. Ct. 1978); "sleazy sleight of hand", *Anton v. St. Louis Suburban Newspapers,* 5 Med. L. Rptr. 2607 (Mo. Ct. App. 1980); "fascist", *Buckley v. Littlell,* 539 F.2d 882 (2d. Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); "lousy agent", *Valentine v. North American Co. for Life and Health Insurance,* 16 Ill. App.3d 277, 305 N.E.2d 746, aff'd, 60 Ill.2d 168, 328 N.E.2d 265 (1973); and "manipulator" and "exploiter", *Hotchner v. Castillo-Puche,* 551 F.2d 910 (2nd Cir. 1977).

perceive editorials—particularly those which concern "economic and political controversies", *Letter Carriers v. Austin, supra,* at 284—as setting forth the publisher's opinions or sentiments.

> "[W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion." *Gregory v. McDonnell Douglas Corp.,* 17 Cal.3d 596, 131 Cal. Rptr. 641, 644, 552 P.2d 425 (1976).

Having found that Petitioners intended to use the term "securities" in its literal sense and not as a synonym for "bonds", and that they knew that securities were sold on McHale's legal opinion, the trial court then found sufficient evidence of actual malice to support a judgment for the plaintiff.[8] Yet, regardless of whether Petitioners had intended to use the term "bonds" or "securities", the statement still is couched in the form of an opinion, and therefore, irrespective of Mr. Shearman's motive, the statement is absolutely privileged under *Gertz, Greenbelt,* and *Letter Carriers.*

## II. SUBJECTIVE AWARENESS OF THE FALSITY OF AN EDITORIAL COMMENT CANNOT BE FOUND WHERE THE PUBLISHER BELIEVED IN THE TRUTH OF THE MEANING INTENDED TO BE CONVEYED

Assuming the challenged sentence published by petitioners was reasonably capable of being interpreted as a false statement of existing fact, and not as a sarcastic and facetious expression of opinion, the trial court's automatic application of liability under *New York Times* upon the evidence showing that

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[8] There was no clear and convincing evidence to show that Petitioners' use of the word "securities" for "bonds" was *not* done to avoid undue repetition of the word "bonds", but rather to "inflict harm [upon McHale] through falsehood." *Garrison v. Louisiana,* 379 U.S. 64, 74 (1964).

Petitioner recognizes that the unintended import of his statement is false, ignores the subjective nature of the *New York Times* standard relating to a publisher's motive at the time of publication, and provides insufficient constitutional protection for honest, unintended misstatements of fact.

As stated in *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968), the principal underlying this Court's decision in *New York Times* is that:

> "the stake of the people in public business and the conduct of public officials is so great that [in defamation litigation involving public officials] neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies".

Accordingly, "the finder of fact must determine whether the publication was indeed made in good faith". *Id.* at 732. Publication in good faith does not require the espousal of a particular editorial viewpoint; thus Petitioners' conditional privilege from liability under *New York Times* is not overcome by proof that petitioners may have wished to defeat McHale's appointment as city attorney. The privilege is lost only upon clear and convincing evidence of knowing or reckless falsifications of fact. A publisher must have "a high degree of awareness of . . . probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). This standard has the effect of protecting even ignorant or irresponsible publications. *St. Amant, supra,* at 731.

The facts of *St. Amant v. Thompson* illustrate how this standard of fault must be applied. In that case, St. Amant, a candidate for public office, made a televised speech wherein, without any verification, he read a series of questions which he had put to J. D. Albin, a local union member, and Albin's answers to those questions which falsely charged local Deputy Sheriff Thompson with criminal conduct. The Supreme Court of Louisiana upheld a verdict in Thompson's favor on the grounds that St. Amant "gave no consideration to whether or not the statements defamed Thompson and went ahead heed-

less of the consequences; and he mistakenly believed he had no responsibility for the broadcast because he was merely quoting Albin's words." 390 U.S. at 730.

In reversing the decision of the Louisiana Supreme Court, this Court observed that:

> "St. Amant's mistake about his probable legal liability does not evidence a doubtful mind on his part. That he failed to realize the import of what he broadcast—and was thus heedless of the consequences for Thompson—is similarly colorless." *Id.* at 733.

It may be said that in the heat of the debate over the appropriateness of McHale's appointment, the American Press published its allegedly offending statement heedless of its effect on McHale. Yet an honest mistake as to the legal import of a publication made without an intent to convey a false statement of fact, is not sufficient evidence of actual malice. It is emphatically submitted that in failing to adequately consider the petitioners' honest belief in the truth of the editorial comment's intended meaning, the trial court below failed to comport with the requirements of *New York Times* and *St. Amant.*

When a publisher honestly intends to express through a hypothetical and figurative factual scenario a particular opinion, but instead chooses words that unintentionaliy convey an untrue statement of fact, liability founded upon the manifest falsity of that statement gives inadequate "breathing space" to unintentionally erroneous statements which are inevitable in free debate. Knowledge as to the falsity of a fact which the speaker honestly did not mean to convey does not constitute "actual malice". If a speaker honestly believes he is conveying a true statement of fact, or an idea, a joke, or ridicule understood to be nothing more, he should be protected, for he has not published a "calculated falsehood". *Garrison v. Louisiana,* 379 U.S. at 75.

In *Good Government Group v. Superior Court,* 150 Cal. Rptr. 258, 586 P.2d 572 (Cal. 1978), the California Supreme Court, in an opinion written by Justice Mosk, addressed the question whether charges made in the midst of a heated political conflict which accused the plaintiff of "extortion" and "blackmail" constituted actionable defamation. While upholding the trial court's denial of summary judgement for the defendant, because it was ambiguous whether the objectionable terms were employed in a literal or figurative sense, the California Supreme Court did address the question whether the plaintiff had raised a material issue of fact with respect to publication with actual malice. In so doing, the court discussed a theory of liability similar to that adopted by the trial court in the instant case.

> "[Plaintiff's] position is . . . that since defendants concede that they were aware prior to publication that [plaintiff] had never committed extortion or blackmail, they published the defamatory statements with knowledge of falsity, and thus the test for malice set forth in *New York Times* is satisfied.
>
> We disagree with this proposed simplistic formula. It is undisputed that negligence in the publication of a defamation is insufficient to meet the test of malice under *New York Times, (Garrison v. Louisiana* (1964) 379 U.S. 64, 78-79 [1 Med. L. Rptr. 1548]; *Rosanova v. Playboy Enterprises, Inc.* (S.D. Ga. 1976) 411 F. Supp. 440, 448.) If we were to accept [Plaintiff's] contention, it would mean that a defendant who makes a statement which is ambiguous in the sense that it can reasonably be viewed as either fact or opinion, but who neither intends the statement to bear a factual meaning nor believes that it will be understood by the reader in that fashion, will be guilty of libel if a jury later determines that the article was understood in its factual, defamatory sense.
>
> Such a holding would render a defendant liable for a defamatory statement negligently made and would create precisely the chilling effect on speech which the *New York Times* rule was designed to avoid. The

> Supreme Court made it clear there that the reason for its ruling requiring a showing of malice in libel actions involving the conduct of public officials is that otherwise "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." Such a rule "dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments". (376 U.S. at p. 279, 84 S. Ct. at p. 725)
>
> If [Plaintiff] was to prevail in his view, the result would be a hobbling of free speech by the continuing fear of liability for the use of inexact semantics. The First Amendment protects not only the expression of a political opinion but the choice of words used to convey that opinion." 150 Cal. Rptr. at 263-264.

Justice Mosk went on to hold that in order to find actual malice from the publication of ambiguous words which could be construed as fact or as opinion,

> "the jury must find not only that the words were reasonably understood in their defamatory, factual sense, but also that the defendant either deliberately cast his statements in an equivocal fashion in the hope of insinuating a defamatory import to the reader, or that he knew or acted in reckless disregard of whether his words would be interpreted by the average reader as defamatory statements of fact." *Id.* at 264.

The trial court's judgement of liability rests on the finding that Petitioners published a statement of fact with knowledge or reckless disregard of its falsity. The fact that the sale of securities upon McHale's opinion was both common knowledge, and even implicitly admitted in Petitioners' editorial, was deemed to be evidence of actual malice. It is respectfully submitted that the form and context of the libelous statement clearly indicated that the words in question merely conveyed

ridicule, opprobrium, and Petitioner's disapproval for McHale's performance as a public official.

> "As such they had no real meaning except to indicate that the individual who used them was under a strong emotional feeling of dislike toward [the plaintiff]. Not being intended or understood as statements of fact they are impossible of proof or disproof. Indeed such words of vituperation and abuse reflect more on the character of the user than they do on that of the individual to whom they are intended to refer. It has long been settled that such words are not themselves actionable as libelous . . . ." *Curtis Pub. Co. v. Birdsong,* 360 F.2d 344, 348 (5th Cir. 1966), quoting *Rice v. Simmons,* 2 Del. 417, 429 (1838).

The trial court's reading of the objected-to sentence "is hardly a realistic indication of how this publication would be read" by the people of Lake Charles. *Borski v. Kochanowski,* 3 Mass. App. Ct. 269, 271, 331 N.E.2d 556, 557 (1975).

> "Since the essence of liberty is freedom of expression in the political arena, the law recognizes the reality of interperate, ill-considered or rash attacks upon all [those] in or seeking public office." *Desert Sun v. California Superior Court,* 158 Cal. Rptr. 519, 521, 97 Cal. App. 3d 49, 52 (Cal. App. 1979).

The trial court's strained and excessively literal construction of the Petitioners' publication undermines this nation's commitment to protect not only the bare reporting of facts, but also polemical advocacy as to our political process. Beyond that, even if the words at issue do exceed the limits of protected, albeit caustic, opinion, the trial court erred in imposing liability when Petitioner honestly believed its editorial advocacy would not be understood as statements of fact, but as opinion. The court's shorthand application of the *New York Times* actual malice standard fails to recognize that implicit in this standard of fault is the requirement that a publisher has an appreciable awareness that the statement in question is one of fact, the intended meaning of which is capable of being defamatory, and

is not merely hyperbole, epithet, or sarcastic humor which has long been a feature of protected political debate in this country.

Petitioners' editorial comment might have been more artfully articulated, but it does not constitute the defamation of a public official founded upon a subjective intention to inflict harm through falsehood.

## CONCLUSION

The result in the lower court in this case typifies the inflexibility of state appellate courts, and more specifically the Louisiana Supreme Court, in addressing themselves to cases involving the press under the First Amendment. The tendency to permit and uphold punitive applications of local prejudice is particularly noticeable in press related cases. The press is not inarticulate, nor a non-quill bearing animal. In its efforts to report on the operations of government, it often times aggravates and wounds the feelings of those thrown into public limelight. Yet, thankfully, under our system of republican democracy, the press serves the people by providing needed information and commentary. In so doing, the press speaks in a multitude of voices, not all of which will be pleasing to certain segments of the community. Our Constitution is unique in the history of the world, in that it not only guarantees the existence of such a multitude of voices, but it also protects those voices from judicial verdicts and judgments intended to punish a particular viewpoint. Yet today, almost two hundred years since the adoption of the Bill of Rights, we find yet another example of the refusal of a local judicial system to grasp the true meaning of freedom of expression in our Country. We need hardly remind this Court of *Grosjean v. American Press Co.*, 279 U.S. 233 (1936), *Times Picayune Pub. Co. v. U.S.*, 345 U.S. 594 (1953), *Garrison v. Louisiana*, 379 U.S. 64 (1964), and *St. Amant v. Thompson*, 390 U.S. 727 (1968), to cite a few cases arising from the lower courts in Louisiana, in both the state and federal systems, which have required this Court to reverse their respective rulings against the press.

We urgently ask that in this case the Court address itself to the questions presented with a view to reaffirming the absolute

constitutional protection accorded to editorial rhetoric and hyperbole, an issue never directly addressed by this Court, and to applying the standard of "constitutional malice" to the publication of editorial comment unintentionally capable of a defamatory interpretation.

We assert that this is not a routine, "run of the mill" libel case, but rather one that offers this Court a unique opportunity to clarify one issue never directly addressed in this forum, and one issue which has produced increasing confusion in lower courts since 1964.

Respectfully submitted,

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# Appendices

ROBERT M. MCHALE,
*Plaintiff and Appellee-Appellant,*

v.

LAKE CHARLES AMERICAN PRESS *et al.*,
*Defendants and Appellants.*

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No. 7756.

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COURT OF APPEAL OF LOUISIANA,
THIRD CIRCUIT.

Oct. 8, 1980.

Rehearings Denied Dec. 1, 1980.

Before, CULPEPPER, DOMENGEAUX and CUTRER, J.J.

CULPEPPER, Judge.

The plaintiff, Robert M. McHale, sues the defendant Lake Charles American Press and its publisher, W. Hugh Sherman, for damages caused by a defamatory editorial. The trial judge awarded plaintiff compensatory damages in the sum of $150,000, but rejected plaintiff's claim for punitive damages and attorney's fees under LSA-C.C. Article 2315.1A. The defendants appeal. Plaintiff also appeals, seeking punitive damages and attorney's fees.

The district judge has written a thorough opinion with which we agree, except for the denial of attorney's fees on the gounds that plaintiff is himself an attorney. With the exception noted, we adopt as our own the following opinion of the trial judge:

> "This is a defamation action arising out of an editorial published by the Lake Charles American Press on July 21, 1977. Entitled 'What's story behind McHale reappointment?', the editorial attacked the

reappointment of Robert M. McHale as City Attorney of Lake Charles. It made a number of statements critical of him. In his petition, McHale alleged several statements were actionably defamatory. At the beginning of trial, he announced he would concentrate on but one. The Court does likewise. That statement is:

> "No bond buyer would buy a nickel's worth of securities on McHale's opinion.

"Plaintiff McHale is an attorney. Defendant Lake Charles American Press, Inc., is the corporate owner of the newspaper 'American Press'. Defendant W. Hugh Shearman is the publisher. He is also the author of the above quoted statement.[1]

"McHale has practiced law in Lake Charles since 1956 when he graduated fromTulane University Law School and was admitted to practice in Louisiana. In 1965 he was appointed City Attorney for Lake Charles. Two years later he became attorney for the Lake Charles Harbor and Terminal District, representing the Port of Lake Charles. One of his duties for these public bodies was legal advice in public finance. As such, he was involved in numerous issues of certificates of indebtedness, paving certificates and sewerage certificates issued by the City, and certificates of indebtedness issued by the Port. Most of these securities were sold to investment buyers on the strength of his opinion alone, but for the larger issues he associated the services of a law firm in Baton Rouge, Benton, Benton & Benton, whose sphere of recognition as bond specialists was broader than his.

"In his petition against these defendants, filed five days after the editorial, McHale alleged that the statement attacked his professional competence, particularly his competence in his specialty legal field of bonds and other public securities; that the publication caused him loss of reputation, respect and

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[1] A third defendant, Thomas B. Shearman, was dismissed by the Court at the conclusion of plaintiff's evidence, as having no tort relationship to the case.

integrity, both in his private and in his professional life; and that the publication was made with actual knowledge of its falsity or with reckless disregard of whether or not it was false. He asked for damages.

"Defendants responded with the defense that the statement was true, or substantially so, and, in the alternative, they denied that they were culpably aware of its falsity or in reckless disregard of whether or not it was false.

"The editorial is here reproduced in its entirety. The statement sued on appears at the end of the fifth paragraph.

**WHAT'S STORY BEHIND**
**McHALE REAPPOINTMENT?**

The reappointment of Robert M. McHale as Lake Charles city attorney smells to high heaven. Is it any wonder that the public has lost faith in persons who hold offices of public trust?

We are appalled that Mayor William Boyer, who became the city's chief executive with a reputation for public spirit, could see fit to cram McHale's appointment down the throats of taxpayers.

McHale has lived well at the public trough for over a decade, reaping thousands of dollars in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees.

Boyer has promised to make a full accounting of all fees, salaries and expenses paid to McHale by the city over the past 10 years. We expect him to hold to this promise.

We will not be content to rest until we have determined to the penny how much McHale has been paid by the city. It is a matter of public record and the public deserves the full story. The bond fees are totally unnecessary and are a waste of taxpayers' money. No bond buyer would buy a nickel's worth of securities on McHale's opinion.

Boyer's image has been badly tarnished by his cozy relationship with McHale and his stubborn refusal to name

someone else city attorney. The city is loaded with legal talent and we will never understand why Boyer is so determined to give the post to a controversial attorney.

McHale is the man, you may recall, who teamed with three other persons with political clout to wring over a million dollars in profits from the state when the group leased the former Sears building on the downtown mall.

As if that wasn't political favoritism at its worst, we now have to listen to Woody Watson, president of the Lake Charles City Council, defend the "sweet deal" lease. Watson, by the way, is a business associate of Boyer's.

McHale was just a good business man, Watson said, and if the state paid too much rent money, that was the state's problem. Just who does Watson think the state really is? The state is you and me and we don't like to be suckered by anybody.

**AMERICAN PRESS EDITORIAL**

We wonder how much longer the taxpayers will stand for public funds being siphoned off for the benefit of politicians and their cohorts.

McHale has also promised he will give the public the full story of how much he has earned as city attorney. We wonder if his report will include the names of other local citizens who have shared in the tax funds he has received from the city and a list of funds he may have received from others who have performed work for the city.

Meanwhile, the people of Lake Charles are waiting for Boyer and Watson to explain the reasons for their unqualified support of McHale. The voters put both men in office and they have a right to demand what's behind the McHale reappointment. We are waiting impatiently for answers, fellows.

What are you up to now?

"LAW

"McHale was a public official. This case must accordingly be decided on the principles established by *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d. 686 (1964). The Louisiana Supreme Court in *Kidder v. Anderson,* 354 So.2d 1306, at 1308 (La. 1978), states the *New York Times* standard regulating recovery of damages by a public official claiming defamation:

> "A public official may not recover damages for a defamatory statement, even if false, relating to his official conduct 'unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not'. *New York Times Company v. Sullivan,* 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Moreover the public official plaintiff must meet this burden not merely by a preponderance of the evidence, but with 'clear and convincing proof'. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974)."

"The United States Supreme Court recently said in *Herbert v. Lando,* 441 U.S. 135, 99 S.Ct. 1635, at 1645, 60 L.Ed.2d 115 (1979):

> "[I]n the 15 years since *New York Times,* the doctrine announced by that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures. *Curtis Publishing Co. v. Butts* [388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094] *supra; St. Amant v. Thompson* [390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262] *supra; Gertz v. Robert Welch, Inc., supra; Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). At the same time, however, the Court has reiterated its conviction—reflected in the laws of defamation of all

> of the States—that the individual's interest in his reputation is also a basic concern. *Times Inc. v. Firestone, supra,* at 455-457, 96 S.Ct., at 966; *Gertz v. Robert Welch, Inc.,* 418 U.S., at 348-349, 94 S.Ct., at 3011."

"There are no concrete guidelines applicable to specific fact situations by which proof of knowing or reckless falsity can be measured. Reckless disregard will depend for its ultimate definition on the marking out of its outer limits through a case by case adjudication. *St. Amant v. Thompson,* 390 U.S. 727 at 730, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). '[T]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of its publication.' Id., 88 S.Ct., at 1325. Neither negligence nor failure to investigate on the one hand, nor ill will, bias, spite, or prejudice on the other, standing alone, are sufficient to establish either a knowledge of the falsity of, or a reckless disregard of the truth or the falsity of the materials used. But evidence of negligence, of motive and intent, may be adduced for the purpose of establishing by accumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. *Curtis Publishing Company v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), *Goldwater v. Ginzberg,* 414 F.2d 324 (2nd Cir. 1969), cert. denied 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970). *Herbert v. Lando,* supra, discusses at length the range of permissible evidence going to prove knowledge or reckless disregard: 'Courts have traditionally admitted any direct or indirect evidence relative to the state of mind of the defendant and necessary to defeat a conditional privilege or enhance damages'. 99 S.Ct., at 1643. Also, 'to be liable the alleged defamer of public officials ... must know or have reason to suspect that his publication is false' and the 'proof of the necessary state of mind [can] be in the form of objective circumstances from which the ultimate fact [can] be inferred'. 99 S.Ct., at 1641.

"The Court will now proceed to discuss this 'state of mind' evidence, remembering as mandated by *Kidder v. Anderson,*

354 So.2d 1306, at 1308 (La. 1978) that state of mind must be judged:

> "... not on the basis of an evaluation of sworn testimony at a trial (after full opportunity to rebut accusations) but rather on the basis of information available to the [news personnel] at the time of publication."

"THE EVIDENCE

"The elements of plaintiff's case are (1) publication, (2) defamation, and (3) knowing or reckless falsity.

"The first two elements, publication and defamation, present no difficulty.

"There is no question that the statement was published, that is, actually communicated to others. The American Press is a daily newspaper with wide circulation throughout the south-west area of Louisiana where plaintiff is engaged in the practice of law.

"The defamatory effect of the statement is apparent with equally convincing clarity. No one could dispute this. No witness did. According to the testimony of attorneys, bankers, investment experts, public officials, a clergyman, and others, McHale enjoyed a good reputation generally, and a good reputation specifically in the field of public finance. The statement 'No bond buyer would buy a nickel's worth of securities on McHale's opinion' directly attacked and damaged his reputation within his profession. It articulated as a fact a condemnation that portrayed him as a totally incompetent bond attorney.

"What would this sentence in context convey to the ordinary reader? It was inevitable, in my opinion, that the great majority of readers interpreted it exactly for what it said, that McHale's opinion on securities was worthless to any bond buyer. Since he had been identified in the editorial earlier as an attorney who 'has lived well at the public trough ... reaping

thousands . . . in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees', I believe the average reader got the impression that not only was he an incompetent attorney, whose opinions on securities were worthless, but that there was also some dishonesty connected with his acceptance of fees for bond issues and legal opinions without having rendered a legal service. The statement was defamatory.

"Most of the evidence in the case focused on the third element, knowing or reckless falsity. Before going into a point by point analysis of the evidence as it bears on conduct and state of mind, it is necessary to briefly discuss the editorial's subject matter and the history of that subject matter.

"A year and a half before this editorial was written, McHale had resigned his post as City Attorney, retaining his job as Port Attorney but otherwise devoting himself full time to his private law practice. In 1974 he had been under considerable fire from the newspaper because of a transaction in which a corporation owned by him and four friends had business dealings with the State of Louisiana. This corporation, Ryan St. Properties, Inc., leased from its owners a building on the downtown mall of Lake Charles formerly occupied by Sears, Roebuck. Knowing that the State was interested in moving its scattered welfare offices to one location, the corporation succeeded in negotiating a lease with the State to house this office in the Sears building. The Press criticized this transaction in a series of some 19 news articles during 1974, on the ground that since the five owners, including McHale, were political figures, political influence was apparent, and also on the ground that the lease rate to the State was excessive. This transaction will hereafter be referred to as the 'Sears lease'. It is one of the stated editorial reasons for the Press' opposition to McHale's reappointment, which occurred by appointment of the Mayor and approval of the City Council on July 6, 1977.

"The editorial, it can be seen, sets out two basic reasons for the newpaper's opposition to plaintiff's reappointment: the first, in the language of the editorial itself, was the 'fees he has been paid for bond issues, legal opinions and other assorted fees'; the other, his involvement in the Sears lease.

"To prove that the defamers knew or had reason to suspect that the editorial statement was false, plaintiff's evidence focused on conduct and state of mind, and objective circumstances from which the ultimate fact might be inferred. The evidence of knowing or reckless falsity may be grouped into the following categories:

"1. The news articles published earlier about the Sears lease.

2. The publisher's knowledge of exculpatory information (the appraisals) about the Sears lease which he failed to disclose to his editors or the reading public.

3. An American Press reporter's personal interview with McHale one or two days before the editorial was published, and the contents of a related news article published in the same edition of the paper as the editorial on July 21, 1977.

4. The preparation of the editorial and its contents.

5. Numerous prior legal advertisements in the newspaper naming McHale as having rendered the approving legal opinion on a number of offerings of securities.

6. The publisher's personal knowledge based on his membership on the Board of Directors of a local bank, and

7. Other evidence.

"The Court will proceed now to a discussion of these seven categories.

*"1. The Sears Lease*

"The Sears lease came to light in early 1974. It was exhaustively treated in news articles throughout that year. The difference between the rent paid and the rent obtained suggested a substantial profit. The rent paid was $3,000 a month. The rent from the State called for $17,000 a month. Calculated on a ten year primary term, the square foot rent obtained was $5.50 per year. Among other conditions of this recorded lease, the company bound itself to completely renovate the building

in accordance with detailed plans and specifications, pay base rate utilities, and purchase land to provide a parking lot for 200 cars.

"Beginning January 23, 1974 and continuing through August 27, 1974, the American Press published 19 news articles about this lease. Sixteen named McHale and the others. These articles suggested that the State paid too much rent based on the visible disparity between the square foot rental paid by the lessors and what the State paid them. There was also the suggestion of political patronage because the five lessors were supporters of the Governor of Louisiana. The headlines employed words like 'sweet deal', 'skullduggery', 'robbery' and 'fraud'.

"Plaintiff offers these article as the first evidence of state of mind. He says that although they appear as news articles, they clearly reveal the Press' opinion of the Sears lease and its design to impress that opinion on its readers. He urges that this design was achieved by slanting, the deliberate and repetitious use of facts favoring its interpretations of the lease, and the suppression of equally known facts which had they been published, would have given the reader a choice of what to believe.

"The Court has carefully read these 19 news articles. Most of them appear to be somewhat lacking in objectivity. They partake more of the style of an advocate than that of an unprejudiced journalist. One gets the impression that by emphasis, connotation and repetition, the authors were intent on developing a precise theme, that the transaction was fraught with politics and a cheat to the public fisc. At the trial, when asked to explain what hard evidence existed of political manipulation and excessive rent charged to the State, the answers by defense witnesses were uniform: all five lessors were known to be political supporters of the Governor and the lease to the State on its face showed a large profit when compared to the price originally paid by the investors. Beyond that, these witnesses were either unable or unwilling to state facts which reasonable minds would expect to exist to bridge the gap between suspicion of wrongdoing and wrongdoing itself.

"However slanted these news articles may have been, they are First Amendment protected.

"It should also be observed that McHale was not singled out for special treatment in any of these 19 articles. The condemnation of political influence and excessive rent was leveled equally on all five of the participants.

"*2. The Appraisals*

"Three years later the editorial of July 21, 1977 was published and it said:

> *"McHale is the man, you may recall, who teamed with three* [sic] *other persons with political clout to wring over a million dollars in profits from the State when the group leased the former Sears building on the downtown mall.*

When this language was penned, W. Hugh Shearman knew something that neither his editors nor the reading public knew. He knew there existed three real estate appraisals which unanimously indicated that the rent was not excessive, but that in fact it was representative of fair market lease value.[2]

"These appraisals came about in the following manner: Back in 1974 these five investors, smarting under the pain of the 19 news articles and wanting to prove that the lease was not unfair to the State, suggested that appraisals be obtained by all interested parties. The evidence convinces the Court that the Governor, the investors, and the Press agreed that each would procure an appraisal. Appraiser Richard Pease of Lake Charles completed one for James Sudduth (one of the investors) on October 28, 1974. Leroy Cobb, an MAI of Baton Rouge, delivered one to the Governor on November 20, 1974. Holley Heard, an appraiser of Lake Charles, completed one for the American Press on January 14, 1975. These were reduced to writing in formal appraisal reports. In each case, the appraiser undertook to evaluate the lease in terms of fair market value as

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[2] One of these appraisers, Leroy Cobb, writing on November 20, 1974, said 'if inflation continues at its present rate, this will be a very poor lease for the lessors at the end of the fifth year.' (McHale Exhibit No. 11).

of January, 1974. Each supported the view that the square foot rate paid by the State represented the fair market lease value of the property.

"The proof falls short of establishing that Shearman and the Press agreed to any specific use of the appraisals. Some purpose was envisioned, obviously, otherwise the agreement would have been pointless. It was the testimony of the lessors that they had bound themselves to rewrite the lease to conform to the appraisals, had there been a difference.

"Shearman admitted that shortly after January 14, 1975, he was aware of the contents of all three appraisals. The evidence also shows that he did not make known their existence to any of his editors until one week before the trial of this case. He insisted, at trial, as did the editor who learned about the appraisals one week before the trial, that the appraisals made no difference in their evaluation of the lease.

"There is no evidence, aside from Shearman's personal opinion, that these appraisers' views are anything but correct. Even so, their significance is not so much their accuracy as it is their suppression. Their disclosure, though not enlightening about the possible political connections, would at least have been relevant to whether or not the State paid too much rent money. As it turned out, failure to disclose them left the reading public no choice except to continue believing the version espoused by the Press in its 19 news articles in 1974 and rekindled in the editorial of July 21, 1977.

"The Press' failure to give any credence to these appraisals or even acknowledge them, is offered as evidence that, once having taken a position, it was unwilling to retreat from that position despite evidence to the contrary and that it continued to pursue its preconceived plan to discredit McHale by convincing its readers that the Sears lease was politically obtained and unfair to the taxpayers.

"The Court at this point wishes to emphasize that neither the news coverage of the Sears lease in 1974, nor the language of its repetition in the editorial of July 21, 1977, nor the failure to disclose the appraisals—singly or collectively, rise to the

dimension of an actionable defamation. All of this conduct lies safely, and properly, under the protection of the First Amendment. Nor is the Court saying that the lease was good and the Press wrong in its criticism, or that the appraisals were right and the Press wrong in not disclosing them. Who's right and who's wrong is not before the Court for decision, Even if it was, the evidence before the Court is insufficient to make such a determination. What evidence there is, however, suggests that there were in fact two sides to the controversy and that the Press, in 1974 and in 1977, presented only one side.

"This has inferential significance in McHale's proof of actual malice. These factors are weights to put on the scales when the inquiry is whether there was knowing or reckless falsity, because they suggest that the Press had obdurately made up its mind McHale was a bad man and he ought to be exposed and put down.

*"3. The Interview*

"McHale resigned as City Attorney in January of 1976. He stayed on as attorney for the Harbor and Terminal District. He was reappointed City Attorney on July 6, 1977. Several days before the meeting of the City Council, upon learning his reappointment was on the council agenda, the Press did two things: (1) it dispatched a report to McHale's office to find out about the money he had made as City Attorney, and (2) the entire editorial staff was assigned the preparation of the editorial condemning his reappointment.

"The reporter, Bill Shearman, son of the publisher-defendant, met with McHale by appointment on July 19th or 20th and spent an hour in McHale's office discussing salaries, fees, and time spent in representation of the City. There is a dispute about what happened at this interview. McHale and his secretary testified they went over transcripts of proceedings for previous issuances of paving certificates, sewerage certificates, and certificates of indebtedness. They testified they explained the details of one paving transcript page by page, and how the attorney's fee was calculated at three percent of the total paving contract. Included among the contents explained in detail was

McHale's legal opinion, a prerequisite to the sale of the bonds. McHale told young Shearman that the transcripts were there for every fee he had earned as City Attorney, and that the fees could be calculated in accordance with that mathematical formula. He invited Shearman to make the calculations for himself; he did not volunteer to do it for him.

"Shearman made notes of this interview and subsequently turned them over to an editor for the Press. According to the young Shearman, these notes and the interview formed the basis for the news article which was published on the same day as the editorial, July 21. This news article contained the statements,

> *"As City Attorney, McHale gets a commission on bonds the city sells. He said Tuesday that his 'normal commission' was three percent."*

"Young Shearman at trial could not remember having had a transcript explained to him. His notes were not available, having been destroyed a few months after suit was filed (July 26, 1977). The above quoted news statements, however, support McHale's and his secretary's versions of the disclosures made at the interview.

"The information supplied the young Shearman at this interview, which took place one or two days before the editorial was written, suggests that the Press had actual knowledge that city bonds had sold on the strength of McHale's opinion.

*"4. The Editorial*

"The four members of the editorial staff individually drafted a proposed editorial. The date on one of them is July 13, 1977, showing that the editorial's preparation covered a period of at least eight days before its publication. It was not 'hot' news.[3] These drafts were reviewed by the defendant Shearman, and it was his determination that the final draft include the statement 'No bond buyer would buy a nickel's worth of securities on McHale's opinion'.

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[3] *Curtis Publishing Company v. Butts*, 388 U.S. 130, 157, 875 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

"These drafts speak often of bonds and McHale's fees, and show that the drafters were aware he was paid fees for bond issues and legal opinions. In particular, the employment of the following language has significant weight in establishing actual knowledge or reckless disregard for the truth as it relates to the value of McHale's bond opinions:

> *"McHale has lived well at the public trough for over a decade, reaping thousands of dollars in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees.*
>
> *"We will not be content to rest until we have determined to the penny how much McHale has been paid by the city. It is a matter of public record and the public deserves the full story. The bond fees are totally unnecessary and are a waste of taxpayers' money."*

"Accusatory language employed elsewhere in the editorial is said to be further evidence of actual malice, like 'reappointment . . . smells to high heaven', 'cram McHale's appointment down the throats of taxpayers', 'controversial attorney', 'The State is you and me and we don't like to be suckered', and 'public funds being siphoned off'.

"Shearman perused all four drafts, added the statement to the final draft that McHale's opinion on securities was not worth anything to bond buyers, and sent it on its way for publication.

*"5. The Legal Advertisements*

"The issue being whether defendant Shearman should be held inferentially knowledgeable of the fact that bond buyers had brought securities on McHale's opinion before this defamatory utterance, the question arises as to whether the Court can accept his denial of knowledge of numerous legal advertisements that had been run in the paper for years, publicizing in express language the sale of securities on McHale's opinion.

"The evidence reveals that there had been 23 securities offered for sale—certificates of indebtedness, paving certificates and sewerage certificates—totalling in excess of $2½ million,

between the years 1971 and 1977, all of which sold on McHale's sole opinion. The transcript of a typical paving project was introduced in evidence. It shows that 18 legal advertisements were run a total of 25 times. Three of these expressly identify McHale as the attorney whose approving legal opinion would underwrite the offerings. Since there were 23 of these projects, it can be calculated that between the years 1971 and 1977 the Press ran 575 such legal advertisements, 69 of which showed that the securities were offered on the approving opinion of McHale. Shearman himself signed the affidavit of publication on at least one of these on August 2, 1976.

"In addition, there were several million dollars worth of bonds in the form of certificates of indebtedness of the Port of Lake Charles and sewerage certificates of the City that were sold on the joint opinion of McHale and Benton, Benton & Benton, before July, 1977. All of these were likewise advertised the required number of times in the Press.

[4] "While Shearman denied knowledge of the contents of these advertisements, saying that no one, including himself, ever read them, it is difficult to believe that this could have gone unnoticed for so long a period of time. They were there for six years before the editorial and during the eight days of its preparation. They related directly to the subject matter of the editorial. In First Amendment cases perhaps the less the publisher knows, the better, but this does not mean that the publisher can disclaim knowledge of evidence ready at hand. While failure to investigate, standing alone, is not proof of reckless disregard, failure to investigate coupled with other evidence, is relevant to that inquiry. The Court has no hesitation to consider this as another element in the probable awareness or reckless disregard category.

*"6. Shearman's Personal Knowledge Outside of the Newspaper*

"The evidence also reveals that one month before the editorial, Shearman was put in touch with McHale's opinion on the sale of a public security in a connection outside the newspaper. One June 20, 1977, McHale wrote President Boyer of Gulf National Bank of Lake Charles advising that there

would be an offering of $350,000 in certificates of indebtedness of the City of Lake Charles to fund a portion of the costs of acquisition of property for the City. As a member of the Board of Directors of this bank, and a member of the Loan Committee of that Board, whose function it was to approve large loans by the bank, Shearman was present at a committee meeting on June 24, 1977 when the bank's bid on the $350,000 of certificates of indebtedness was approved. The official bid form reflected that the securities would be offered over the approving legal opinion of McHale. Shearman never denied in his trial testimony that he was aware of this. The president of the bank testified that it was not customary to furnish the bank committee with that kind of detail.

*"7. Other Evidence*

"The Court does not give any consideration to the testimony that Shearman had vocalized his intent to 'get McHale'.

"There was three such pieces of evidence. One was a statement made to a witness by a reporter of the American Press in 1974. That reporter was not employed by the Press at the time of the trial. Although the testimony was admitted under Code of Civil Procedure Article 1634, the Court does not give it any particular weight. The other similar remarks attributed to Shearman were testified to by Mayor William Boyer and Port Director Sudduth as having been said to them. The Court cannot consider the statements as relevant evidence under *Kidder v. Anderson,* supra, because they were uttered in 1978, a year after the editorial, in connection with a new series of front page news articles attacking McHale which were then being published.

"For the same reason, the Court does not believe that it is authorized to consider the front page news articles critical of McHale that were published in 1978 as 'other defamatory publications', guided by *Kidder v. Anderson,* supra.

"DEFENSES

"Although the word 'defenses' heads up this portion of the opinion, the Court is mindful that it is not defendants' burden under *New York Times* and other relevant decisions to prove the truth of the statement, nor is it defendants' burden to prove, if the statement was false, that it had a sound factual basis for it and that it was not made knowingly or with reckless disregard, but in good faith. However, there was considerable testimony offered at the trial by defendants regarding what Shearman intended to say, his actual beliefs, and the basis for those beliefs. This testimony, along with the rest of the evidence, must be considered in determining whether McHale has ultimately sustained his burden of proof.

"The first defense is that the statement was true. The second is that if it should be found to be technically false, it was not made with knowledge or reckless disregard. The third is that it was the expression of an opinion, not a statement of fact.

"Shearman's belief in the truthfulness of the statement was based on his experience as a member of the Louisiana Board of Commerce and Industry over a period of 10 years between 1966 and 1976. One of the functions of this Board was to approve general obligation and revenue bond issues across the State that were being considered for industrial inducement purposes. The Board conducted hearings to determine the feasibility of the projects the bonds financed. In this experience, he had noticed that there were three law firms in the State who appeared routinely in connection with bond issues before the Board. Shearman testified that he had observed this to be a general practice, that local counsel would involve special counsel on these bonds, and that the special counsel were always the same three law firms in the State. Benton, Benton & Benton was one. McHale's firm was not. This, according to him, give him the impression first, that bonds would not sell except on the opinion of one of these bond firms and second, that the word 'bonds' meant general obligation or revenue bonds issued for industrial inducement purposes. Since large industrial inducement bonds were the limit of his experience, and McHale, although he had appeared before the Board with

Benton on one occasion as co-counsel, had never appeared individually, Shearman declared he thought it was true that McHale's opinion would not stand alone. Finally, his impression was that while certificates of indebtedness, paving certificates and sewerage certificates might be securities, they were not bonds in the limited sense in which he intended the word 'bonds', and the word 'securities' was intended as a synonym only in the narrow sense that he meant the use of the word 'bonds'. He deliberately chose the word 'securities' in the sentence that he added to the editorial because this was a synonym for 'bonds',[4] and it is good journalistic style to avoid too much repetition of the same word which had already been used three times previously in the editorial.

"He declared that this was his state of mind at the time he penned the offending language and that he believed it to be true and still believes it to be true in this light. Even if the statement was technically incorrect, he urged his good faith belief in its truth at the time he uttered it, as well as a factual basis for that belief, regretting only the failure to make it clear that it was McHale's *sole* opinion that would not be acceptable.

"The Court does not believe this explanation alters the statement's meaning and intent, or the understanding of readers of what was written.

"The meaning intended by the use of the word 'bonds' by the writers on the day that the editorial and related news article were published is clear. No securities of the City of Lake Charles ever went before the Board of Commerce and Industry during the defendant Shearman's 10 year tenure, yet the plain language of the editorial—indeed one of its prominent subjects—was McHale's fees for his legal opinions for city bonds as City Attorney. Since Shearman's only contribution was the one sentence, the use of 'bonds' theretofore in the editorial was not his choice of language, but that of the editors whose experience and knowledge of the terminology employed was not based on membership on the Board of Commerce and Industry. Also,

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[4] Roget's *Thesaurus* was introduced to establish the synonymity of the words. Shearman did not testify he consulted this authority while writing, but he did say he then thought the words were the same.

the young Shearman who looked at a paving transcript in McHale's office before this editorial was written and visually inspected a McHale legal opinion, and two days later used 'bonds' in the news article, knew bonds meant paving certificates. Defendant Shearman, having read the drafts of the editorial he helped to write, must have been aware that when reference was made to McHale's bond fees and opinions for the City, this meant what it said.

"Both 'bonds' and 'securities' were words appropriate in the context. That bonds means securities in the sense of certificates of indebtedness, paving certificates, and sewerage certificates is consistent with customary usage.

" 'Securities' is a synonym for 'bonds', and vice versa. Defendant's brief correctly states that 'securities' can have many different meanings in different contexts. The same is true of 'bonds'. The first of many definitions of the term in Black's Law Dictionary, 4th Ed.Rev. (1968) is: 'a certificate or evidence of debt'.

"According to the testimony of an expert bond attorney, Fred Benton, paving certificates technically are not bonds. The distinction is a technical one only, however, as he further testified that bond attorneys, including himself, and bondbuyers routinely call such certificates bonds.

"At the trial witnesses repeatedly used the words interchangeably.

"One investment underwriter when asked what he called paying certificates said: 'We consider them municipal bonds. To a bondbuyer, it's all the same.'[5]

"Interestingly, the official bid form in use by the City of Lake Charles for its paving certificates, routinely published for years in the paper, uses the word 'bonds' four times, 'certificates' three times, and 'issue' once—all meaning the same thing.

"The Court's conclusion is that McHale's opinion had a value on the bond market, that 'securities' includes certificates

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[5] Lee Murphy deposition, p.27 (McHale Exhibit No. 7).

evidencing public debt, whether referring to regular certificates of indebtedness, or paving or sewerage certificates, and that 'bonds' are generally understood in investment circles to include all these. The Court is convinced that the newspaper intended to use the words as synonyms, that readers understood the words as intended, and that the statement is incapable of an innocent construction on the facts. It was false throughout.

"Defendant's final argument is that this was an expression of opinion and not a statement of fact. *Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed.2d 745, 761 (1974) says '[B]efore the test of reckless or knowing falsity can be met, there must be a false statement of fact.'

"The grammatical test of whether a statement is an opinion or a fact is not simply how the declarant says he meant it. The better test is how readers understand it. The best test is a reflection of what is an opinion and what is a fact. A fact, says Webster's,'is a thing that has actually happened, or is true. It can be checked and agreement on whether or not it is true can easily be reached. An opinion, says Webster's, is what one thinks—a judgment—about some person or thing. No one can prove whether a statement of opinion is true or false. It remains an opinion. Comparatively, a statement of the author's taste of food was found in *Mashburn v. Collin,* 355 So.2d 879 (La. 1977), to be an opinion. The statement here involved was a statement of fact. Whether any bond buyer would buy securities on McHale's opinion is a statement which can be proved true or false.

"LIABILITY

"The statement was false.

"The Court believes that the evidence with convincing clarity shows that it was made while the writer was surrounded by a multitude of facts and circumstances compelling the inference of knowledge. The Court concludes that actual knowledge has been proved, or at least a reckless disregard for the truth. Defendants were in possession of knowledge so

completely at odds with the published statement that only a reckless disregard of the truth can account for its utterance.

"Freedom of expression of public questions and issues was not served by this base and groundless attack on McHale. 'Freedom of the press under the First Amendment does not include absolute license to destroy lives and careers' said Chief Justice Warren in his concurrence in *Curtis Publishing Co. v. Butts,* supra, 87 S.Ct., at 1999.

"DAMAGES

"The American Press has a circulation of 35,000.

"Unquestionably these defamatory words greatly injured McHale's reputation as an attorney, and impaired his standing in the community.

"He has been severely humiliated and embarrassed, and has suffered considerable mental distress.

"The effect on his mental health was confirmed by several doctors, some of whom saw him professionally and others as friends or relatives. There was evidence of personality changes. His personal activities have been reduced and appearances in public curtailed. The mental reaction has required intermittent medical attention and medication.

"Loss of income was alleged but not proved. There was evidence by a preponderance that the defamatory words contributed to his second resignation as City Attorney in January of 1979. Income from bond fees from that source will decrease, but the dollar value of this loss cannot be fixed with reasonable accuracy. He is still the attorney for the Port of Lake Charles. He has not suffered any loss from that source.

"In *Kennedy v. Item Co.,* 213 La. 347, 34 So.2d 886 (1948), the Louisiana Supreme Court recognized that, due to the difficulty of proving pecuniary damages in a defamation action, the amount of damages is left largely to the discretion of the trier of fact.

"In *Gertz v. Robert Welch, Inc.*, supra, the U.S. Supreme Court stated:

> "[A]ctual injury is not limited to out of pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, . . . all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury." 94 S.Ct., at 3012.

"In arriving at the amount of damages, the Court has been influenced by the decision of the La. Court of Appeal in *Kidder v. Anderson*, 345 So.2d 922 (La. App.1 Cir. 1977), reversed on other grounds, 354 So.2d 1306 ([La.]1978). That Court, in reducing a jury award from $400,000 to $100,000, stated;

> "We are persuaded that an award in such amount would have a 'chilling effect' upon the legitimate exercise of the rights of freedom of the press and would lead to undesirable self-censorship, the prevention of which has been the object and purpose of the United States Supreme Court since *New York Times Company v. Sullivan.*" 345 So.2d, at 942.

"After a careful consideration of all the evidence in the case, and mindful of the above quoted *Kidder* language, the Court concludes that an award of $150,000 is appropriate.

"Punitive damages are permissible under La.Civil Code Art. 2315.1A. I would be inclined to grant punitive damages here but for the above quoted expression from the Court of Appeal *Kidder* case. This is the only Louisiana appellate court I know of that has expressed an opinion on the 'chilling effect' of the damage award itself.[7]

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[7] At least two cases outside this state show a concern for First Amendment implications of libel awards: *Sprouse v. Clay Communication, Inc.*, 211 S.E.2d 674, at 692 (W. Va. 1975), cert. denied, [423 U.S. 882] 96 S.Ct. 145 [46 L.Ed.2d 107](1975), and *Airlie Foundation Inc. v. Evening Star Newspaper Co.*, 337 F.Supp. 421 (D.D.C. 1972).

> "For the reason that plaintiff is himself an attorney, the Court declines to award attorney fees authorized by Civ. Code Art. 2315.1A."

"In his appeal, plaintiff seeks punitive damages and attorney's fees under LSA-C.C. Article 2315.1A, which was in effect at the time of the defamation at issue here, but was repealed by Act 324 of 1980. Article 2315.1A reads as follows:

> "In addition to general and special damages, the plaintiff who obtains a judgment because of having been defamed, libeled, or slandered may be awarded punitive damages and reasonable attorneys fees, if it is proved that the defamatory, libelous, or slanderous statement on which the action is based was made with knowledge of its falsity or with reckless disregard of whether it was false or not."

## PUNITIVE DAMAGES

The trial court declined to impose punitive damages against defendants, although he had the discretion to do so under Article 2315.1A. Punitive damages have been imposed in some 19th century defamation cases, but following *Vincent v. Morgans Louisiana & Texas Railroad and Steamship Company,* 48 La.Ann. 933, 74 So. 541 (1912), Louisiana jurisprudence has consistently held that punitive damages are not recoverable at civil law. 37 La.L.Rev. 113. This was legislatively changed in 1976 by the enactment of Civil Code Article 2315.1. Despite the legislative change, no reported Louisiana case has awarded punitive damages in a defamation case.

Civil Code Article 2315.1A incorporates the U. S. Supreme Court test of *Gertz v. Welch,* 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), which held that states may permit a recovery of punitive damages in defamation cases when liability is based on a showing of knowledge of falsity or reckless disregard for the truth. Thus, after *Gertz,* states were free to enact statutes allowing punitive damages where there is a

showing of actual malice as defined by *New York Times v. Sullivan.* Absent actual malice, only compensatory damages may be awarded.

Other jurisdictions have allowed punitive damages in addition to compensatory damages. Most notable is *Curtis Publishing Company v. Butts,* 388 U.S. 130 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1964) in which the Supreme Court approved an award of $400,000 in punitive damages. The courts have generally left the amount of punitive damages to the discretion of the jury. *Goldwater v. Ginzberg,* 414 F.2d 324 (2d Cir. 1969) and *Reynolds v. Pegler,* 223 F.2d 429 (2d Cir. 1955). Other jurisdictions have expressed concern over an award of punitive damages despite its sanction in *Gertz v. Welch.* This concern is illustrated in *Sprouse v. Glay Communication, Inc.,* 211 S.E.2d 684 (W. Va. 1975), where the Supreme Court of West Virginia stated:

> "It would appear that the penumbra of protection of the First Amendment is such that punitive damages may only be recovered in cases where the award of actual damage is insufficient to dissuade others in like circumstances from committing similar acts in the future. The policy embodied in the First Amendment of encouraging broad dissemination of public information forecloses an award of punitive damages which jeopardize the existence of a newspaper when such damages are unnecessary to protect the public from similar conduct in the future or to make possible the vindication of plaintiff's rights in the absence of demonstrable actual damages. An award of $750,000 would have a chilling effect upon the legitimate exercise of First Amendment rights and would lead to the type of self-censorship which has been the object and purpose of the United States Supreme Court to prevent since *New York Times v. Sullivan.*"

In view of the substantial award for actual damages in the present case, an additional award of punitive damages may well have a chilling effect, as noted by the trial court in its written opinion. We find no manifest error in this conclusion.

## ATTORNEY'S FEES

LSA-C.C. Article 2315.1A provides that reasonable attorney's fees "may be awarded" where the defamatory statement was made with knowledge of its falsity or with reckless disregard of whether it was false or not. The article makes the award of attorney's fees discretionary with the trial court. Thus, in the present case the trial judge had the discretion to award reasonable attorney's fees or not.

In his written reasons quoted above, the trial judge stated that he declined to award attorney's fees for the reason that the plaintiff is himself is an attorney. We do not agree that this is a valid reason to deny attorney's fees under statutes permitting such awards.

We find two Louisiana cases holding that an attorney who represents himself cannot recover attorney's fees. See *Westenberger v. Bernard,* 160 So.2d 312 (La.App. 4th Cir. 1964), which cites *Ealer v. McAllister & Company,* 19 La.Ann. 21. Plaintiff cites two Texas cases which allowed an attorney-plaintiff, who did not represent himself, to recover attorney's fees upon successful completion of his suit. *Youngblood v. Wilson & Cureton,* 321 S.W.2d 887 (Tex.Civ.App. 1959) and *Urschel v. Crow,* 314 S.W.2d 423 (Tex.Civ.App. 1958). 20 Am.Jur.2d Sec. 77 indicates cases from other jurisdictions are divided on the issue of whether an attorney-plaintiff who represents himself can claim attorney's fees. However, we find no authority in Louisiana or any other jurisdiction for a rule that an attorney who employs another attorney to represent him cannot claim attorney's fees if he is successful in his suit, and if such fees are authorized by statute.

In the present case, plaintiff contracted with three other attorneys to represent him. He agreed to pay one of these attorneys a contingent fee of 30% of the award of damages. This agreement is a factor to be considered but is not binding on the courts. A reading of the record shows the attorneys employed are highly skilled and experienced. The amount of pretrial work is extensive. The trial took four days. The record on appeal includes 17 volumes containing 2,586 pages. The

attorneys were successful in obtaining a judgment for compensatory damages in the sum of $150,000. We conclude plaintiff is entitled to an award of $25,000 for attorneys' fees.

For the reasons assigned, the judgment appealed is amended to increase the award by the sum of $25,000, representing reasonable attorneys' fees under LSA-C.C. Article 2315.1A. Otherwise, the judgment is affirmed. All costs of this appeal are assessed against the defendant-appellant.

AFFIRMED, AS AMENDED.

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FILED
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CLERK

No. 80-1790

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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LAKE CHARLES AMERICAN PRESS, INC.
and WILLIAM HUGH SHEARMAN,
*Petitioners,*

vs.

ROBERT M. McHALE,
*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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| *Time, Inc. v. Firestone,* 424 U.S. 448, 96 Sup.Ct. 958 L.Ed. 2d 154 (1976) ..... | 10 |
| *Watts v. Indiana,* 69 Sup.Ct. 1347, 338 U.S. 49..... | 12 |

No. 80-1790

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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LAKE CHARLES AMERICAN PRESS, INC.
and WILLIAM HUGH SHEARMAN,
*Petitioners,*

VS.

ROBERT M. MCHALE,
*Respondent.*

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## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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## I

## STATEMENT OF THE CASE

### A. Course of Proceedings

On February 3, 1981, the Honorable Lewis F. Powell refused the application of petitioners, LAKE CHARLES AMERICAN PRESS, INC. and HUGH SHEARMAN, to stay execution of this money judgment rendered in favor of ROBERT M. MCHALE, respondent, for damages resulting from a libelous article which attacked the professional reputation and competency of Mr. McHale. Prior to the article, Mr. McHale had practiced law for over twenty years and developed a recognized expertise in the field of public securities. Approximately twenty million dollars of public securities were issued and sold over his opinion.

This libel case was *judge tried* in the Fourteenth Judicial District Court, Parish of Calcasieu, State of Louisiana. After a

five day trial and after reviewing seventeen (17) volumes of evidence, the trial court issued a twenty-six (26) page opinion. The opinion details the trial court's factual conclusions and findings that the LAKE CHARLES AMERICAN PRESS, INC. and HUGH SHEARMAN published a false statement of fact with "actual malice" which greviously injured the reputation of Mr. McHale. A *compensatory* award of $150,000.00 was made. McHale's request for punitive damages and attorney fees was rejected.

Petitioners, thereafter, appealed the decision to the Third Circuit Court of Appeal, State of Louisiana, which *unanimously* upheld the verdict and adopted, verbetum, the trial court's opinion. The Court of Appeal, also, added an award of $25,000.00 for attorney fees.

The Louisiana Supreme Court, thereafter, denied defendants' request for a review of that decision.

Upon denial of the petitioner's request for a stay of the judgment by Mr. Justice Powell, the judgment was paid in full and a release executed. A copy of the Receipt and Satisfaction of Judgment is attached hereto as Appendix "A".

**B. Present Posture of Case**

The court should note carefully the opinion which petitioners seek to have reviewed by this court.

The law in libel and slander cases which, prior to this case, was well established by this court through its decisions in *New York Times v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed. 286 (1964); *St. Amant v. Thomas,* 390 U.S. 727, 88 S.Ct. 1323 (1968); *Gertz v. Welch,* 418 U.S. 323, 94 S.Ct. 2997 (1974); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975 (1967) and even this court's most recent interpretations in *Herbert v. Lando,* 441 U.S. 135, 99 S.Ct. 1635 (1979) was carefully and thoroughly analyzed by the trial court and court of appeal.

No dispute as to the "public official" status of the plaintiff was raised, and the stringent requirements of proof and standards for recovery were applied and met.

No new areas or frontiers of libel law were blazed by the trial court.

Punitive damages were rejected, although authorized by state law. (See La. Civil Code Article 2315.1—now repealed)

The compensatory damages are supported by volumes of medical testimony, other expert testimony and lay testimony.

No new issues in the context of libel law and the First Amendment are presented by this case. No legal principles were applied which are at conflict among the various lower courts.

The only real issue is one of fact—Do the facts of this case support a finding of fact by the lower court that the defendant published a libelous statement with "actual malice" as defined by the *New York Times* case, *supra.?* This question was resolved by the trial court unfavorably to the defendants and this has been defendants' only real complaint.

## C. Facts

The petitioners have presented this court with only a few of the facts of this case. Because the Court has held in *St. Amant v. Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 1325 (1968) that the meaning of "reckless disregard" is not encompassed in one "infallible definition", but rather, must be "marked out through case by case adjudication" a detailed review of the facts of this case is required.

[1] Bob McHale was appointed City Attorney for the City of Lake Charles on July 6, 1977. He had previously served in that position from 1965-1976. During this same period of time, he represented the Lake Charles Harbor and Terminal District. For both of these entities, he performed the usual legal work and, in addition, developed a specialized practice of bond work—issuing legal opinions for millions of dollars of public securities issued by these political bodies.

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[1] Although respondent does not believe that transmission of the seventeen (17) volumes of evidence is essential to an understanding of the case, Rule 19.1, and accordingly has not requested transmission of the record, transcript and other record references are respectfully included.

The appointment in July, 1977, of Bob McHale as City Attorney triggered the publication of the following article:

**"What's story behind**
**McHale reappointment?**

"The reappointment of Robert M. McHale as Lake Charles city attorney smells to high heaven. Is it any wonder that the public has lost faith in persons who hold offices of public trust?

"We are appalled that Mayor William Boyer, who became the city's chief executive with a reputation for public spirit, could see fit to cram McHale's appointment down the throats of taxpayers.

"McHale has lived well at the public trough for over a decade, reaping thousands of dollars in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees.

"Boyer has promised to make a full accounting of all fees, salaries and expenses paid to McHale by the city over the past 10 years. We expect him to hold to this promise.

"We will not be content to rest until we have determined to the penny how much McHale has been paid by the city. It is a matter of public record and the public deserves the full story. The bond fees are totally unnecessary and are a waste of taxpayers' money. No bond buyer would buy a nickel's worth of securities on McHale's opinion.

"Boyer's image has been badly tarnished by his cozy relationship with McHale and his stubborn refusal to name someone else city attorney. The city is loaded with legal talent and we will never understand why Boyer is so determined to give the post to a controversial attorney.

"McHale is the man, you may recall, who teamed with three other persons with political clout to wring over a million dollars in profits from the state when the group leased the former Sears building on the downtown mall.

"As if that wasn't political favoritism at its worst, we now have to listen to Woody Watson, president of the Lake Charles City Council, defend the 'sweet deal" lease. Watson, by the way, is a business associate of Boyer's.

"McHale was just a good businessman, Watson said, and if the state paid too much rent money, that was the state's problem. Just who does Watson think the state really is? The state is you and me and we don't like to be suckered by anybody.

**American**
**Press**
**Editorial**

"We wonder how much longer the taxpayers will stand for public funds being siphoned off for the benefit of politicians and their cohorts.

"McHale has also promised he will give the public the full story of how much he has earned as city attorney. We wonder if his report will include the names of other local citizens who have shared in the tax funds he has received from the city and a list of funds he may have received from others who have performed work for the city.

"Meanwhile, the people of Lake Charles are waiting for Boyer and Watson to explain the reasons for their unqualified support of McHale. The voters put both men in office and they have a right to demand what's behind the McHale reappointment. We are waiting impatiently for answers, fellows.

"What are you up to now?"

The editorial was published on July 21, 1977, two weeks after the re-appointment of Bob McHale.

Hugh Shearman, the publisher of the paper and acting as the editor at the time the article was written and published, directed that several members of his staff draft an editorial concerning the re-appointment. (Tr. 1585) Further, Bill Shearman, Jr., Hugh Shearman's son, was directed to go to Mr. McHale and interview him concerning the re-appointment. Young Shearman did this a few days prior to the publication of

the editorial. The interview with Mr. McHale lasted approximately one hour. Both Mr. McHale and his secretary explained in detail the nature of Mr. McHale's bonding work, several "bond issues" issued over McHale's opinion, and what, exactly, was involved in the issuances of these various public securities. The nature of the other legal work for the City was discussed. Fees for this work were discussed. The method of calculating the amount of the fee for each of the securities issued was told to young Shearman. During this hour-long interview, young Shearman made notes and the notes were turned over to the staff which Hugh Shearman had directed to draft the editorial. Strangely enough, these notes were destroyed a few weeks after this lawsuit was filed, despite the fact that young Shearman testified that his notes were *usually* kept. Further, these notes were not produced in response to a subpoena issued upon the filing of the suit to the Lake Charles American Press for all the information the Lake Charles American Press had pertaining to the subject of the lawsuit. (Tr. 528)

A news article resulting from the interview between young Shearman and Mr. McHale appeared in the Lake Charles American Press on the same date as the editorial. (McHale 1, Tr. 798) The article by young Shearman referred to McHale's bond work and to the amount of fees that he received on the bond work.

The draft editorial, prepared at Hugh Shearman's instruction, also referred to McHale's "bond work" and contemplated his doing the "bond work" on future contemplated bond issues. (McHale 5, Tr. 870-880)

Hugh Shearman and his staff of writers were very familiar with McHale's "bond work". Not only do the articles and rough drafts referred to above demonstrate their actual knowledge, but the Lake Charles American Press, being the official journal for both the City of Lake Charles and the Lake Charles Harbor and Terminal District, published hundreds of legal advertisements referring to the various public securities and, specifically, publicizing the fact that these securities were being sold on McHale's opinion. As the trial judge pointed out, there were at least 575 of these advertisements with 69 of the

advertisements stating that the securities were being sold on McHale's opinion. For purposes of verifying the publication of these legal ads, Hugh Shearman, himself, swore under oath on August 2, 1976, approximately one year prior to the article at issue here, that such a legal notice was published in the Lake Charles American Press. The language used in these advertisements should be carefully noted. (See page 847 of the transcript and the page following.) In this particular advertisement, approximately $100,000.00 worth of paving certificates were being sold and the advertisement stated that the purchaser would:

> "... accept delivery of said certificates at Lake Charles, Louisiana, it being understood that the City of Lake Charles, Louisiana, will furnish us free of charge at the time of delivery of said certificates, the unqualified approving legal opinion of Robert M. McHale, of counsel, McHale & Bufkin, Attorneys at Law, 1901 Oak Park Boulevard, Lake Charles, Louisiana."

Shearman testified, two weeks after this lawsuit was filed, that he was familiar with the contents of these legal ads and that he reads the ads when required to sign affidavits of publication. (Tr. 572)

Besides the legal advertisements, Hugh Shearman was made directly aware of Mr. McHale's work as a bonding attorney. Hugh Shearman served on the Board of Commerce and Industry for the State of Louisiana from 1966-1976. Part of the duties of this board was to review bond issues that were being issued in connection with industrial projects sponsored or connected with political subdivisions of the State. Two bond issues, on which Mr. McHale rendered an opinion, came before this board. These issues involved millions of dollars and Mr. McHale went to Mr. Shearman in order to obtain his approval as one of the members of the Board of Commerce and Industry. Mr. McHale discussed in detail the nature of his involvement in the issues, the nature of the issues and the fees which Mr. McHale was receiving for his work on these issues and other issues. From these conversations, Hugh Shearman knew that

Mr. McHale was issuing and selling securities on his opinions. (See Tr. 2117-2121 and see McHale Exhibits 32 and 33.) Hugh Shearman never denied these conversations.

In addition, just one month prior to the publication of the article, Hugh Shearman, as a member of the Board of Directors and the Discount Committee for Gulf National Bank of Lake Charles, authorized the purchase of $350,000.00 of certificates of indebtedness issued by the City of Lake Charles over the legal opinion of Mr. McHale. Mr. Shearman, on deposition, denied that he participated in this purchase, however, the certified copy of the minutes of that meeting clearly reflects his attendance and vote to purchase. (See McHale Exhibit 21, Tr. 1215-1216.) Faced with the truth at trial, Shearman never denied that he was aware that these certificates of indebtedness were purchased by his bank on Mr. McHale's opinion.

Surrounded by all these facts and with the knowledge that Mr. McHale had long been working in the field of public finance and issuing opinions on various securities, Hugh Shearman, in his editing of the various drafts, which also referred to McHale's "bond work", of the editorial, penned the following language:

> "No bond buyer would buy a nickel's worth of securities on McHale's opinion."

Shearman's reason for the statement—*McHale was making too much money.* (Tr. 2566-2568) Shearman was dead set on stopping this and the easiest way was to ruin McHale's reputation so he could no longer do bond work.

Nothing was done by Hugh Shearman or any of his staff to ascertain whether this fact was true. (Tr. 2582) Not even the semblance of an investigation as to McHale's competency as a bonding attorney was made. Rather, the facts, which Hugh Shearman and the American Press had at their fingertips, were ignored and, with the knowledge in Hugh Shearman's head that McHale was in fact issuing opinions on hundreds of thousands of dollars of securities, Hugh Shearman penned the editorial and sent it out for publication and reading by over 35,000 subscribers in an eight parish area.

This was not the first time that Hugh Shearman had ignored the facts in regard to Bob McHale. In 1974, the Press ran a series of nineteen news articles pertaining to the lease of a building owned by Mr. McHale and three other business associates which was leased to the State of Louisiana for the purposes of locating and consolidating the Welfare Offices for the State of Louisiana. The crux of the articles was that the lease arrangement was a "rip-off" to the State and that the rental being charged to the State was excessive; it having been obtained, in Shearman's view, as a political favor for McHale and his associates. McHale, in these news articles, was charged with "skulduggery", "robbery" and "fraud". This was all done at a time when Hugh Shearman had in his possession three appraisals from different certified real estate appraisers, one of which was chosen by Shearman, certifying that the rent charged to the State by McHale and his associates was a fair market lease value for the property that was being leased.

Shearman let no one know about the appraisals; neither the public nor his staff. He withheld the truth because, as he testified under oath, he and only he determines what is published by the Lake Charles American Press. (Tr. 602) With the July 21, 1977, article, the article at issue here, Hugh Shearman went one step further. He penned the offensive statement with all this knowledge and with his mental state such that there is no doubt that Shearman's action constituted a subjective intention to inflict harm through falsehood.

## II

## LAW AND ARGUMENT

Petitioners have asked this court to grant a review of this decision based on the fact that several other recent lower court cases, totally unrelated to this case, have been won by plaintiffs who have been slandered. Counsel for petitioners fails to give the court the facts of each of these cases and the law applied in them. Further, these cases involve large punitive awards, unlike the present case. Simply because a plaintiff has won, petitioners contend these other cases and this case must be overturned.

The issue of this case involves only one thing—the loss of a reputation. This Court has recently confirmed its concern for the loss of reputation when it stated in *Herbert v. Lando,* 441 U.S. 135, 99 S.Ct. 1635, at 1645, 60 L.Ed. 115 (1979):

> "(I)N the 15 years since *New York Times,* the doctrine announced by that case, which represented a major development and which was widely perceived as essentially protective of press freedoms, has been repeatedly affirmed as the appropriate First Amendment standard applicable in libel actions brought by public officials and public figures. *Curtis Publishing Co. v. Butts* (388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed. 2nd 1094) supra; *St. Amant v. Thompson* (390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed. 2d 262) supra; *Gertz v. Robert Welch, Inc.,* supra; *Time, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed. 2d 154 (1976). *At the same time, however, the Court has reiterated its conviction—reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern. Time, Inc. v. Firestone,* supra, at 455-457, 96 S.Ct., at 966; *Gertz v. Robert Welch, Inc.,* 418 U.S., at 348-349, 94 S.Ct., at 3011". (emphasis added)

The principles of *New York Times, Curtis Publishing Co.* and *St. Amant* were strictly adhered to in this case.

This decision has no "chilling effect" or "killing effect" on the First Amendment. Rather, it is the petitioners who have, by deliberately and recklessly lying, not only "chilled" but "killed" a man's reputation. What does the loss of a reputation mean?

> "Good character, or reputation, consists of the general opinion of people respecting one. It is built up by a lifetime of conduct. It is probably the dearest possession that a man has, and once lost, it is almost impossible to regain. The possession of a good reputation is conducive to happiness in life and contentment. The loss of it, the absence of it, brings shame, misery and heartache. It is not like material

> things in life that one may have today, lose tomorrow, and repossess again the next day. Once lost, it is practically impossible of being regained, and it is to that injured reputation that a particular consideration in awarding damages in a libel case is directed. In that regard, you must level your level-headed common sense, and not be carried away by mere feelings and resentment. Injury to character and reputation is a grave and serious injury, and the law contemplates that for such an injury, the jury will bring to bear upon the problem their sense of justice and worldly wisdom insofar as money may recompense under such circumstances, fairly compensate for it." (See *O'Donnel v. Philadelphia Record Company,* 356 Pa. 307, 51 Atl. 2d 75)

As Chief Justice Warren said in *Curtis Publishing Co. v. Butts,* supra:

> "Freedom of the Press under the First Amendment does not include absolute license to destroy lives and careers."

## III

## SUMMARY OF PETITIONERS' ARGUMENT

Petitioners' arguments are two fold and are made alternatively.

First, petitioners contend that their statement is pure opinion, not fact. Alternatively, if it is fact, the proof of "actual malice" is not adequate because of Shearman's self serving declaration that he thought the statement was true.

Nowhere have petitioners alleged any "manifest error" as to the Court's finding of fact. Further, petitioners do not contend that the trial court's factual conclusion that the statement was not "opinion" and was made with "actual malice" is "clearly erroneous".

Petitioners simply contend that the trial judge and all the other nine judges involved on appeal, failed to agree with what petitioners consider a more reasonable view.

This Court has held that "all those matters which are usually termed issues of fact are for conclusive determination by the State Courts and are not opened for reconsideration by this Court. Observance of this restriction in our review of State Courts calls for the utmost scruple." *Watts v. Indiana,* 69 S.Ct. 1347, 1348, 338 U.S. 49. (Also see Federal Rule Civil Procedure, Rule 52; *Arceneaux v. Domingue,* 365 So.2d, 1330) (Louisiana, 1979).

No error of law is alleged to have been made but, on the contrary, the decision cited by petitioner in pointing out why the trial judge was wrong are the very same decisions which the trial court relied upon.

## A.

**Opinion Versus Fact**

Petitioners contend that somehow the statement along with the rest of the article is only "loose language or undefined slogans". In support of their contention that such language and slogans should be completely protected, petitioners cite the cases of *National Association of Letter Carriers v. Austin,* 418 U.S. 264, 284 (1974) and *Mashburn v. Collins,* 355 So.2d 879 (Louisiana 1977).

The trial judge relied on these very same decisions in determining that the statement involved was not opinion, but rather fact assertions. The trial judge in the present case stated:

> "Defendants' final argument is that this was an expression of opinion and not a statement of fact." *Letter Carriers v. Austin,* 418 U.S. 264, 284, 94 S.Ct. 2770, 2781, 41 L.Ed. 2d 745, 761 (1974) says 'before the test of reckless or knowing falsity can be met, there must be a false statement of fact.'

> "The grammatical test of whether a statement is an opinion or a fact is not simply how declarant says he meant it. The better test is how readers understand it. The best test is a reflection of what is an opinion and what is a fact. A fact says Websters, is a thing that has actually happened, or is true. It can be checked and agreement on whether or not it is true can easily be reached. An opinion, says Websters, is what one thinks—a judgment—about some person or thing. No one can prove whether a statement of opinion is true or false. It remains an opinion. Comparatively, a statement of the author's taste of food was found in *Mashburn v. Collins,* 355 S.2d 879 (La. 1977), to be an opinion. The statement here involved was a statement of fact. Whether any bond buyer would buy securities on McHale's opinion is a statement which can be proved true or false."

The case of *Mashburn v. Collins, supra,* sets out in detail the distinctions between fact and opinion and what the court should look at in making that determination:

> "Although difficult to state in abstract terms, as a practical matter, the crucial difference between statement of fact and an opinion depends upon whether ordinary persons hearing or reading the matter complained of would be likely to understand it as an expression of the speaker's or writer's opinion, or as a statement of existing facts.
>
> * * *
>
> In determining whether an expression is a statement of fact or opinion of under the common law, words must be read in their context. Words which, taken by themselves, would appear to be a positive allegation of fact, may be shown by the context to be a mere expression of opinion or argumentative influence. *On the other hand, if a statement, ostensibly in the form of an opinion, is apparently based on facts regarding the*

> *plaintiff or his conduct that have not been stated by defendant are assumed to exist by the parties to the communication, the expression gives rise to the inference there are undisclosed facts which justify the opinion. In such a case, the expression, although in a form of an opinion, in reality implies a statement of fact, which is not usually protected by common law privilege. In order for a statement to be defended as fair comment, it must be recognizable by the ordinary, reasonable person as opinion and not as a statement of fact."* (emphasis added.)

In contending that the statement is opinion, petitioners contend that Shearman did not mean it as fact and did not envision it would be taken as fact by his readers.

No matter what test is used—how the person making the statement meant it; how the ordinary and reasonable person perceived it; or if the statement is capable of being proved true or false—the evidence clearly points to a determination that the statement was a fact.

Hugh Shearman testified under oath that the statement was a fact and intended for it to be understood as a fact. Mr. Shearman stated at page 2582 of the transcript:

> "Question: Mr. Shearman, on August 8, 1977, in your deposition, when asked the question, page 9, 'No bond buyer would buy a nickel's worth of securities on McHale's opinion', do you think that's a fact?
>
> "Answer: Yes, sir.
>
> "Question: Your answer was, 'I think that is a fact.'
>
> "Question: You only thought it was a fact, did you not?
>
> "*Answer: I thought it was a fact. I still think it's a fact.*"

Nowhere did Shearman say that this statement was only his opinion or just an angrily issued epithet. He constantly contended it was a *true fact.*

Counsel for petitioners have simply either overlooked advising the court of this important statement or he simply has not read the record in this case. Counsel for petitioners now seek to change their own client's sworn testimony that the statement is a fact and to convince this court it was only his opinion.

Further, evidence of what the readers would understand the sentence to mean is the letter to the editor by a Mr. John R. Fielding (McHale Exhibit 42). The letter was published in the Lake Charles American Press a few days after the offending article. Mr. Fielding, in his letter to the editor of the Lake Charles American Press, stated:

> "Your editorial on the re-appointment of Robert M. McHale as City Attorney was an excellent piece of *fact* reporting of a very serious issue."

Mr. Shearman, on deposition, two weeks after the article was published, stated that the statement was a fact; at trial, Mr. Shearman stated that the statement was a fact; and the court concluded that the readers (Mr. Fielding and others) of the articles felt that it was a fact. Further, the trial judge concluded that the statement was capable of being proved true or false.

Every test or suggestion as to the determination of opinion versus fact set forth by petitioners can only be resolved against the statement being opinion.

The statement at issue is not just political jousting, excited utterances or exaggerated and heated statements made on the spur of the moment. Nor is the statement an epithet or fiery rhetoric such as "crook" or "blackmailer" or "scab".

The language of this article was coldly calculated for over two weeks. It was not "hot news".

The article, also, was not an attempt at persuasion to one's opinion. It asserted, as a fact, that the fees paid to McHale were a waste and totally unnecessary because McHale's legal ability is worthless. The trial judge's opinion is the only reasonable conclusion:

> "What would this sentence in context convey to the ordinary reader? It was inevitable, in my opinion,

> that the great majority of readers interpreted it exactly for what it said, that McHale's opinion on securities was worthless to any bond buyer. Since he had been indentified in the editorial earlier as an attorney who 'has lived well at the public trough . . . reaping thousands . . . in personal wealth from fees he has been paid for bond issues, legal opinions and other assorted fees', I believe the average reader got the impression that not only was he an incompetent attorney, whose opinions on securities were worthless, but that there was also some dishonesty connected with his acceptance of fees for bond issues and legal opinions without having rendered a legal service. The statement was defamatory."

**B.**

**"Good Faith Belief" of Shearman**

The next argument of the petitioners is that the lower courts have ignored the allegedly good faith and honest belief of Mr. Shearman that what he was saying was true or that it was just his opinion or that he did not mean to convey a false fact.

In this regard, the court in *St. Amant, supra,* pointed out that actual knowledge or recklessness cannot automatically be "sworn away" by the defendant. The court stated at page 1326:

> "The defendant in a defamation action brought by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith."

The petitioners' argument as to a good faith belief and expression of belief as to the truthfulness of the statement is simply not acceptable. It was not acceptable to the trial court because of the *numerous inconsistencies* in Mr. Shearman's

sworn testimony. These "inconsistencies" were not minor mistakes but complete reversals of important aspects of sworn testimony.

On deposition, Mr. Shearman testified as follows in regard to this knowledge of the contents of the numerous legal advertisements; some of which he had signed publication affidavits attesting that they had been published in the paper.

> "Question: Do you ever read the material that is given the newspaper to be printed in your newspaper by the City of Lake Charles?
>
> "Answer: Sometimes, yes, sir. Because I have to sign the legals when the manager is not in town.
>
> "Question: Do you know right off hand just about maybe how many times that it has appeared in your newspaper, the Lake Charles American Press, 'we will accept delivery of certificates at Lake Charles, Louisiana, it being understood that the City of Lake Charles, Louisiana, will furnish us free of charge at the time of delivery of said certificates are qualified approving legal opinion of Robert M. McHale'? Do you have any idea—do you know that appeared in your newspaper over and over and over?
>
> "Answer: I'm afraid I would have to answer yes."

At the trial, Mr. Shearman changed his testimony. (Transcript 1614-1616) He said at trial, contrary to his deposition, that he does not read these advertisements and was not aware of their publication.

Again, on deposition, Mr. Shearman testified that he was not a member of the Gulf National Bank Discount Committee which, approximately two months before this article was written, purchased $350,000.00 worth of securities of the City of Lake Charles which have been issued on the opinion of Mr. McHale. (Transcript 548, page 23 of the deposition). Yet the minutes of the meeting of the Discount Committee at which the securities of the City of Lake Charles were purchased clearly reflect that Mr. Shearman was a member of the Discount

Committee and was present at the discount meeting and approved the purchase of $350,000.00 worth of certificates of indebtedness that were issued by the City of Lake Charles under McHale's opinion. (See McHale 21, Transcript 1215.)

Another instance of a change in Shearman's testimony occurred at trial while Mr. Shearman was under direct examination (Transcript 2518). At this point, Mr. Shearman acknowledges that he had read Mr. Holly Heard's appraisal of the Sears building lease and also was sent two other appraisals, one from an appraiser in Baton Rouge and another from Mr. Dick Pease, of Lake Charles. Mr. Shearman states that he felt that the appraisals really showed nothing that he did not already know and, therefore, he should not even print them or inform the public of their existence.

On deposition, however, he clearly denied even knowing about the other two appraisals. At page 601 of the transcript (pages 76 and 77 of Mr. Shearman's deposition), Mr. Shearman states:

> "Question: I have information which causes me to believe that, although you had—you either had them in your possession or access to three different appraisals relative to the feasibility on the part of the State for renting that building and did not make the information available to Mr. Kingery?
>
> "Answer: Is there something the matter with that question?
>
> "Question: Well, is it true?
>
> "Answer: No. I don't have three of them. And if I did—if I had 15 of them, and didn't want to give them to Mr. Kingery, that would be my business.
>
> "Question: Do you have two?
>
> "Answer: No sir.
>
> "Question: Just had one?
>
> "Answer: I don't even know where that is. The tail doesn't wag the dog. Reporters don't tell me what to

do or what to print or when to print it. And nobody else does."

The trial judge certainly was entitled, based on these flagrant discrepancies and out and out lies of Mr. Shearman, to discount in toto any good faith expression of honest belief that what he was saying was true or that he really didn't understand what he was saying. Certainly, in any other civil matter the testimony of a person which has been proven to be false in several respects can be totally discounted. See *Robinson* v. *Liberty Mutual Company,* 309, S.2d 791 (La. App. 4th Circuit 1975); *Ford* v. *State Farm Mutual Automobile Insurance Company,* 303 S.2d 787 (La. App. 3rd Circuit 1977).

Even more so in a libel case which involves the proving of "actual malice", a subjective standard, the finder of fact, the trial judge in this case, is directed by this court's decision in *St. Amant, supra,* to determine if the publication is indeed made in good faith.

In short, petitioners have attempted to convince this court that Mr. Hugh Shearman, the author of this statement, neither intended nor understood the statements he made were statements of fact which he knew or probably knew were false. However, Mr. Shearman's statements under oath approximately ten days after the article was published and his statements at the trial, two and one-half years after the article was published, prove otherwise.

## IV

## CONCLUSION

Petitioners conclude their request for a review of this case with a general attack on the Louisiana Judiciary.

Other references are made throughout petitioners' brief to the "political trial judge", "punitive applications of local prejudice" and "judgments intended to punish a particular viewpoint".

Fifty year old cases such as *Grosjean* v. *American Press Co.*, 279 U.S. 233 (1936) are cited as your reason to reverse this case.

It is not this writer's purpose to defend the Judiciary of Louisiana, past or present, but rather, to represent a client. However, these slurs of "local prejudice" can not go unanswered.

The court should note that petitioners, themselves, rely on a recent Louisiana decision, *Mashburn* v. *Collins, supra.*, which defeated a plaintiff's request for defamatory damages. Further, the Louisiana Supreme Court in *Kidder* v. *Anderson,* 354 So. 2d, 1306 (La. 1978) reversed outright a $400,000.00 jury verdict for a public official because, unlike the present case, the dictates of *New York Times, supra, St. Amant, supra,* and *Gertz, supra,* had not been followed by the trial court.

The so called "political trial judge" involved in this case, several months before the present decision, dismissed a libel action on Summary Judgment against the Lake Charles American Press, Inc. in a suit filed by a local attorney. (See *Hamilton* v. *Lake Charles American Press, Inc.*, 372 So.2d 239 (La. App. 3rd Cir. 1979).

The Louisiana Judiciary has no inbred prejudice against the exercise of First Amendment rights. First Amendment rights are forfeited by the publication of knowing and reckless falsehoods.

The freedom of the Lake Charles American Press is no greater than Robert McHale's freedom to enjoy the pursuit of happiness through good reputation untarnished by knowing and reckless lies. These rights and values must be weighed, but intentional lies have no constitutional value or weight.

This case should set the base standard whereby we know that anything as appalling as what occurred here or worse will not be countenanced; that those public servants who engage in the public domain do not do so at the risk and expense of their reputations being smeared by lies simply because they make legitimate fees through the open democratic processes we all cherish.

Respectfully submitted,

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## APPENDIX "A"

| | |
|---|---|
| ROBERT M. MCHALE<br>VS. No. 77-3089 | 14th Judicial District Court<br>Parish of Calcasieu |
| LAKE CHARLES AMERICAN PRESS, INC., *et al.* | State of Louisiana |
| Filed: Feb. 4, 1981 | s/BESS C. WALLACE<br>Deputy Clerk |

### RECEIPT AND SATISFACTION OF JUDGMENT

Robert M. McHale, plaintiff in the above captioned case, does hereby acknowledge receipt of the sum of TWO HUNDRED TWENTY THOUSAND THREE HUNDRED TEN AND 26/100 ($220,310.26) DOLLARS, in the form of a bank money order, paid to him by Lake Charles American Press, Inc. and William Hugh Shearman, in full payment and satisfaction of that certain judgment rendered by the 14th Judicial District Court, State of Louisiana, in the above captioned matter in favor of Robert M. McHale and against Lake Charles American Press, Inc. and William Hugh Shearman on November 2, 1979, and in full payment and satisfaction of that certain judgment rendered in the above captioned matter by the Court of Appeal, Third Circuit, State of Louisiana, in proceedings bearing No. 7756 on the docket of that court in favor of Robert M. McHale, and against Lake Charles American Press, Inc. and William Hugh Shearman dated October 8, 1980, and Robert M. McHale does hereby authorize and direct the Clerk of Court of Calcasieu Parish, Louisiana, to cancel and erase said judgment from the mortgage records of said parish and should said judgment have been recorded in any other parish or county, Robert M. McHale authorizes the recorder of mortgages of such parish or county to cancel the same from the public record.

IN WITNESS WHEREOF, said Robert M. McHale has executed this act of receipt and satisfaction of judgment at Lake Charles, Louisiana, on this 4th day of February, 1981, before me, the undersigned Notary, and the undersigned competent witnesses.

WITNESSES:

s/LINDA A. BOATRIGHT

s/CLAUDETTE POTTS

s/ROBERT M. MCHALE
Lake Charles, Louisiana
Feb. 4, 1981

s/LOUIS D. BUFKIN
NOTARY PUBLIC

BESS C. WALLACE

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ALEXANDER L. STE
CLERK

No. 80-1790

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

LAKE CHARLES AMERICAN PRESS AND
WILLIAM HUGH SHEARMAN
*Petitioners*

v.

ROBERT M. MCHALE
*Respondent*

**Petitioner's Brief in Reply to Brief of Respondent in Opposition To Petition For Certiorari**

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**Petitioners' Brief In Reply To
Brief Of Respondent In Opposition
To Petition For Certiorari**

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**COME NOW PETITIONERS,** pursuant to Rule 24(4) of the Supreme Court Rules, to address arguments first raised in the Brief Of Respondent In Opposition To Petition For Certiorari received by Counsel for Petitioners on May 22, 1981.

## ARGUMENT

### A. *This Court's Scope of Review*

Respondent argues that the trial court's determination that the statement at issue was not opinion, and was made with actual malice, is a factual conclusion foreclosed from review by this Court. Yet because the actual malice standard, and the protection accorded "opinion" under *Gertz v. Welch,* 418 U.S. 323 (1974), *Greenbelt Pub. Association v. Bressler* 399 U.S. 6 (1970), and other decisions, are matters of constitutional law, there is no doubt that this Court may make an independent examination of the record "so as to assure . . . that the judgment does not constitute a forbidden intrusion on the field of free

expression." *New York Times Co. v. Sullivan,* 376 U.S. 256, 285 (1964).

Moreover, it is respectfully submitted that inasmuch as only statements which do not express pure opinion and which are therefore capable of being false may be defamatory, it is the plaintiff's burden to establish that an allegedly defamatory statement is factual, a burden which in this Court's examination of the record must be shown to have been met with "convincing clarity". See generally, Sack, *Libel, Slander and Related Problems* (P.L.I., 1980) 180.

**B.** ***Opinion Versus Fact***

In his Brief in Opposition, Respondent implies that Petitioners' request that this Court accord constitutional protection to the publication at issue as being a statement of opinion is somehow at odds with the testimony of Petitioner Shearman and/or the legal defenses asserted at trial. Brief in Opposition, at 15, 19. (hereinafter, "Br. Opp."). In response to this, it must first be noted that on September 22, 1978, Petitioners moved for Summary Judgment on the ground, *inter alia,* that the statement "No bond buyer would buy a nickel's worth of securities on McHale's opinion" constituted a non-defamatory expression of opinion. This constitutional defense was also raised before the Third Circuit Court of Appeals for the State of Louisiana.

As yet, Petitioners have not requested that the record of proceedings below be certified and transferred to the Clerk of this Court. Yet, the record will show that at trial, Charles King, a Judge of the Fourteenth Judicial District Court of Louisiana who was called to testify on Defendants' behalf, recognized the challenged statement for what it is—an opinion as to future events.

> "Q: You were aware of the fact, I take it, that Mr. McHale had issued many opinions in the sale of securities, that is, paving and sewerage certificates, and other types of securities, for the City of Lake Charles, were you not?
>
> A: Yes, I was.

Q: Would you, then, contradict the statement that 'No bond buyer would buy a nickel's worth of securities on McHale's opinion'? Would that be inaccurate if, in fact, this City has sold many securities under his opinion?

A: I don't know that I would contradict it, but I don't know that it would be accurate, either. It would be a conclusion or an opinion.

Q: All right, sir.

A: I don't know if a prospective bond buyer would or would not." Tr. at 814.

In short, Petitioners' published statement could not possibly have expressed "a thing that has [or has not] actually happened, . . . is [or is not] true." Br. Opp. at 13.[1]

Moreover, there was no persuasive evidence introduced at trial which would suggest that Petitioner Shearman—rather than making a poor choice of words to say what he intended—deliberately phrased his statement as he did merely to avoid potential liability for falsely stating that even securities issued with McHale serving as co-counsel on the approving legal opinion have not been sold.

Respondent argues that Publisher Shearman acknowledged that his statement was "a fact." Tr. at 14. Yet just as, for purposes of determining defamation liability, the statement "No bond buyer would buy . . . " cannot properly be isolated from its context within the editorial as a whole, *Greenbelt Pub. Ass'n. v. Bressler*, 398 U.S. 6, 13-14 (1970), *Scott v. McDonnell Douglas Corp.*, 112 Cal. Rptr. 609, 618, n. 11 (1974), so too is it inappropriate to divorce two answers given by Shearman under cross-examination from the essential thrust of his testimony.

On numerous occasions at trial, Shearman and editors for the American Press testified that the challenged statement was intended to refer to general obligation bonds, and to suggest that those bonds could not be sold on McHale's legal opinion

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[1] Similarly, the fact that one's opinion of future events may later prove to be inaccurate does not then transform that opinion into a misstatement of fact.

alone. Tr. at 873-74, 878-79, 992, 1031, 1041. The basis for believing this was that McHale rarely if ever prepared approving legal opinions on certificates of indebtedness without serving as co-counsel to other attorneys who specialized in bond work.[2] Tr. at 182, 233, 640-42, 741-43. Moreover, as McHale himself testified at trial, he had never been the sole attorney to issue an approving legal opinion on general obligation or revenue bonds. Tr. at 641-42, 644, 668-69.

Thus, it is respectfully submitted that Publisher Shearman's testimony that the intended meaning of the statement in question is a "fact," was simply his assertion at trial of the continuing accuracy and validity of his opinion, and does not constitute an admission that the opinion, if derogatory, is therefore defamatory.

### C. *"Good Faith Belief" of Shearman*

Respondent argues that due to various "inconsistencies," "flagrant discrepancies and out and out lies of Mr. Shearman" at trial, Br. Opp. at 17, 19, the trial court was entitled to discount Mr. Shearman's testimony as to his honest belief in the correctness of his editorial, and as to his inadvertent failure to accurately express himself. One of these "inconsistencies" is Shearman's testimony at trial, contrary to his deposition testimony, that he did not in fact read paving certificate advertisements published in the American Press referring to approving legal opinions issued by McHale. This trial testimony was volunteered by Mr. Shearman, who explained that at the deposition, "I was being a smart aleck and I anticipated the question and I answered it wrong and I told you this before and I'll tell it to you again." Tr. at 1017.

Respondent offers this "inconsistency" as just further proof that Petitioner Shearman intended in 1977 to inflict harm on

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[2] One of these attorneys testified that simply because an attorney has issued the sole legal opinion approving what ultimately becomes a successful sale of paving or sewerage certificates does not mean that that attorney is sufficiently competent or reputable to generate the buyer confidence in his bond opinions necessary to successfully market general obligation bonds. Tr. at 178, 182.

Mr. McHale through falsehood, as he allegedly did in Petitioners' series of articles on the Sears Lease in 1974, articles which, incidentally, the trial court below found to be "First Amendment protected." Petition for Writ of Certiorari at 11a.

Another alleged inconsistency or lie is said to be found in Shearman's deposition testimony that he did not participate in the purchase by the Gulf National Bank Discount Committee of $350,000.00 in certificates of indebtedness issued on McHale's opinion. Respondent notes that the minutes of the relevant Committee meeting which were introduced into evidence at trial show that Shearman was in attendance when the Committee agreed that the bank should purchase said certificates. Further review of the trial transcript, however, makes it clear that when the suggestion was made to the Committee that the bank purchase those certificates, the Committee may not even have been told who the approving attorney was.

Respondent also hastens to point out that,

> "Faced with the truth at trial, Shearman never denied that he was aware that these certificates of indebtedness were purchased by his bank on Mr. McHale's opinion." Br. Opp. at 8.

Yet undersigned counsel's review of the trial transcript does not show that Shearman was ever asked to admit or deny his awareness of that fact.

Another purported inconsistency is alleged to exist between Shearman's August, 1977 deposition testimony and his 1979 trial testimony, pertaining to whether in 1974 he possessed three appraisals of the Sears lease entered into by McHale and various business associates. At deposition, Shearman said:

"A: No I don't have three of them [viz., appraisals].

Q: Did you have two?

A: No, sir.

Q: Just had one?

A: I don't even know where that is." Tr. at 1003-04.

At trial, Shearman said that in 1974 he "had" (received?; retained?) the three appraisals. Tr. at 1004. Of course, Shearman at trial went on to say "At that time I couldn't tell you where they were. ****I don't know that I had one, two or three at the time.**** As far as Mr. Pease's [appraisal] is, that could have been thrown away the day I got it." Tr. at 1005.

In any event, an impartial review of the trial transcript—including the deposition testimony introduced as evidence of prior inconsistent statements—does not reveal what Respondent alleges are "complete reversals of important aspects of sworn testimony", Br. Opp. at 17, which render inherently improbable Publisher Shearman's testimony that he did not publish with actual malice.

Of course, the central issue in this case is not discontinuities in trial testimony. Nor is the central issue one of semantics—i.e., fine linguistic distinctions between fact and opinion.[3] The fundamental issue is how far will the rights of free speech and of a free press in Louisiana extend in protecting harshly worded criticisms of public officials. Will those freedoms protect an editorial that acknowledges a public official's past performance of certain official functions, but goes on to express a qualitative viewpoint as to the merits thereof by stating that not one of a figurative group of citizens would value that official's performance.[4]

The fitness of Robert McHale for reappointment as City Attorney and, more specifically, whether the use of tax revenues

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[3] Dean Prosser once wrote that this distinction between fact and opinion "has proved to be a most unsatisfactory and unreliable one, difficult to draw in practice." *PROSSER ON TORTS* (3rd. ed. 1964) 814. Professor McCormick has said that the assumption that fact and opinion are readily distinguishable "is an illusion." *McCORMICK ON EVIDENCE* §11 at 23 (2nd ed. 1972).

[4] Obviously the fact that criticism of this sort may also disparage an official's private reputation, and thereby injure his or her private economic interests, does not strip the "citizen-critic of government" of his protection under *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964) and *Greenbelt Pub. Ass'n v. Bressler*, 398 U.S. 6 (1970). See generally, *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

to retain McHale for Lake Charles' municipal securities work, which almost without exception has required the collaborative efforts of other attorneys, are matters which obviously pertain to local self-government and go to the heart of protected political discourse.

Respondent also objects to what he describes as Petitioners' "general attack on the Louisiana Judiciary" and "slurs of 'local prejudice'." Br. Opp. at 19, 20. Petitioners wish to assure this Court that they do not wish to slur or vilify the Louisiana Judiciary generally or the trial court below. Petitioners merely wish to present for the record their alarm at the increasing frequency with which newspapers seeking to perform their constitutional role as best they know how are suffering judgments of enormous sums which would seem not to reflect a trial court's or jury's realistic assessment of culpability and reputational injury, but rather retaliation for unpopular viewpoints and aggressive reporting.

And query, might the verdict below also be characterized as punitive, giving insufficient latitude to dissident critics of the local political establishment in Lake Charles?

Will this verdict dampen political debate in Lake Charles and elsewhere by compelling newspapers, public speakers, and other commentators in Louisiana to now evaluate a public official's performance or capabilities only in declarative and not emotional terms?

Are editors and publishers safe in permitting the publication of disparaging prose which purports to express the sentiments of other citizens, or just that which would express the attitudes of some other citizens, but not all or none? Is the colloquial use in "op-ed" commentaries of phrases such as "No one would . . . " now libelous if not literally accurate? Will the decision below permit "uninhibited, robust, and wide-open" "debate on public issues," *N.Y. Times, supra,* at 270, or merely allow pale, tame, qualified expressions of political preference?

Petitioners respectfully submit that the decision below shows an unrealistic lack of confidence in the ability of our

citizenry to recognize editorial opinion and, through exposure to conflicting ideas and the true facts concerning a public servant's performance, to draw their own conclusions. The decision below reflects a narrow and crabbed view of First Amendment freedoms, and should be reversed.

Respectfully submitted,

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